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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1948

GEORGE W. HUMPHREY, WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PENNSYLVANIA, PETITIONER

v.

BERNARD W. SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 264-275) is reported at 72 F. Supp. 935. The majority (R. 277-284) and dissenting (R. 284-287) opinions in the Court of Appeals are reported at 170 F. 2d 61.

JURISDICTION

The judgment of the Court of Appeals was entered September 14, 1948 (R. 287). The petition

for a writ of certiorari was filed December 10, 1948, and was granted February 7, 1949 (R. 297). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the second paragraph of the 70th Article of War,[1] providing that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," was complied with in this case.

2. Whether, assuming there was not at least substantial compliance with AW 70, the failure to comply was a fatal jurisdictional error which invalidated the subsequent court-martial proceedings.

STATUTE INVOLVED

The 70th Article of War (Act of June 4, 1920, c. 227, subch. II, § 1, Art. 70, 41 Stat. 759, 802, as amended by the Act of August 20, 1937, c. 716, § 2, 50 Stat. 724; 10 U.S.C., 1946 ed., 1542) provided at all times relevant hereto as follows:[2]

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[1] As explained in footnote 2, *infra*, what was formerly the second paragraph of this Article has, since February 1, 1949, been renumbered as AW 46b. However, for the reasons explained in footnote 2, we shall continue to refer to the provisions of the paragraph as though they were still contained in AW 70.

[2] Effective as of February 1, 1949, the first and second paragraphs of this Article, as copied in the text, and all of the fourth paragraph except the first two sentences, have been taken out of AW 70 and (with one amendment, to be noted) renumbered as AW 46a, AW 46b, and AW 46c, respectively. Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II,

Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial for trial until after a thorough and

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§§ 222, 231, 244. The third paragraph of AW 70 has been similarly eliminated from that Article and (also with one amendment, to be noted) renumbered as AW 47b. *Id.*, § 223. Consequently, all that now remains of AW 70 as it formerly stood (and as copied in the text) is the first two sentences of the fourth paragraph. *Id.*, § 231.

Aside from the formal changes mentioned—consisting of the transfer of most of the provisions of former AW 70 to more logical places in the framework of the Articles of War (see Appendix B, *infra*, at p. 98)—the only amendments of former AW 70 that have been effected by the 1948 Act (which, however, made numerous changes in other Articles of War, all effective as of February 1, 1949, see §§ 201-244) have been the two following: (1) The insertion, between the second and third sentences of the second paragraph of former AW 70 (now AW 46b), of the following new provision: "The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts martial jurisdiction over the command." (2) The addition, at the end of the third paragraph of former AW 70 (now AW 47b), of the following new provision: "and no charge will be referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation thereof has been made as prescribed in the preceding article, that such charge is legally sufficient to allege an offense under these articles, and is sustained by evidence indicated in the report of investigation."

The former AW 70 governs this case and, since it is referred to throughout the record as being part of "AW 70," we shall, in order to avoid confusion, continue thus to refer to it, except where the particular point under discussion requires that it be referred to under its new AW number.

thereafter duly approved and published (R. 39-41), and the United States Penitentiary at Lewisburg, Pennsylvania, was designated as the place of confinement (R. 40, 73). On March 26, 1946, by order of the Secretary of War, at the direction of the President, so much of the imprisonment portion of the sentence as was in excess of 16 years was remitted (R. 38-39).

On January 2, 1947, respondent filed in the District Court for the Middle District of Pennsylvania a petition for a writ of habeas corpus (R. 2-5), which gave rise to the present proceeding. So far as is now pertinent, the petition challenged the jurisdiction of the court-martial on the ground that the second paragraph of the 70th Article of War, *supra*, pp. 3-4, providing in pertinent part that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made," had not been complied with. Specifically, it was alleged that Lieutenant Todd, the officer who conducted the AW 70 investigation, "was the accuser in fact and the original investigator of the alleged crime" and consequently "was ineligible to be the impartial investigator under the 70th Article of War," and, further, that Todd's AW 70 investigation "was neither thorough nor impartial and * * * was not competently made" (R. 4). This was the first occasion on which any attack on the jurisdiction of the court-martial was made, no such at-

tack having been made at any time during the court-martial proceedings themselves.[3]

A rule to show cause issued (R. 6) and a response to the petition and rule was filed (R. 6-8). The response denied the pertinent allegations of the petition, and affirmatively averred that "Lieutenant Todd did not conduct the preliminary investigation which was conducted by agents of the Criminal Investigation Division [of the United States Army]" and that the "pre-trial investigation was regularly, impartially, competently and completely conducted * * *" (R. 8). Following a hearing (R. 9-37), at which respondent (R. 11-30) and Todd (R. 31-37) testified and the entire court-martial record (R. 37-260) was received in evidence, the District Court (Follmer, D. J.) entered an opinion and order (R. 264-275) finding that AW 70 had been satisfied, dismissing the rule to show cause, and denying the petition for the writ.

On appeal, the Court of Appeals for the Third Circuit, one judge dissenting (R. 284-287), reversed the order of the District Court and remanded the cause with the direction to discharge respondent from

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[3] Respondent was represented at the court-martial trial by three counsel. Captain Kapelman was Defense Counsel, Lieutenant Crollard was Assistant Defense Counsel, and Lieutenant Lieberman was Associate Defense Counsel (R. 112, 113). Kapelman and Crollard were appointed by the court, and Lieberman was personally retained (R. 24, 113). Crollard and Lieberman were both lawyers, the latter with ten years' experience (R. 35, 262). The record does not indicate whether Kapelman was a lawyer (see R. 269).

asked leave to accompany them but had been refused. He started to follow them, however, and after Mrs. Kerry parted company with Miss Cullum to go to her own home, he continued to follow Miss Cullum and commited the assault a short while later. (R. 164-169.) Less than an hour after the assault upon Miss Cullum, another English girl, Sheila Dale, was attacked and raped by a soldier at the same location (R. 119-127, 97). The rape of the Dale girl was reported to the British civilian police on the following morning, July 12, 1944 (R. 96, 191), and on that day a British constable named Felton started an investigation (R. 96-97, 191) which culminated one week later, on July 18, in the identification of respondent as the assailant of both girls (see p. 13, *infra*).

Felton, on the morning of July 12, interviewed and took a statement from Dr. Beckett, the physician who examined the Dale girl (R. 95-96), interviewed and took a statement from Miss Dale (R. 91-93), took possession of certain material evidence, consisting of the skirt and knickers Miss Dale was wearing when raped (R. 191), and received from Miss Dale a description of her assailant (R. 199). That afternoon, accompanied by Miss Dale and another British policeman named Chaplin, Felton visited the scene of the attack (R. 96-97, 191-192), observed that the nearest house, known as the Marsh Cottage, was about 100 yards distant (R. 97, 192), and went to Miss Dale's home,

folk" (R. 97). Lieutenant Alan Todd was the Provost Marshal of this station (R. 31), and it was he who subsequently conducted the AW 70 investigation with which this case is concerned (*infra* p. 141). Felton and Chaplin went to Todd's office, told Todd about the attacks on the two English girls by an American soldier, explained that "an investigation had been started by the C. I. D.," and stated that they, the constables, "were on the Station to see if they could aid in the investigation in any way" (R. 31). This was Todd's first knowledge of the matter (R. 31, 32). The constables furnished Todd a description of the assailant as given to them by the girls, but Todd was unable, at first, to recognize any one stationed at the base as answering the description (R. 31). At the request of the constables, Todd summoned a number of soldiers stationed at the base for interviews, and Todd and the constables questioned them (R. 32, 200). At about 3:15 p. m., respondent was summoned for questioning (R. 32, 97, 200). Both Todd and the constables participated in the interrogation of respondent (R. 32). Respondent "seemed * * * to fit the description" as supplied by the girls (R. 32). Tending to confirm respondent's identity as the assailant were the fact that he had "a wound scab on the base of the thumb" of his left hand (R. 97, 193)[6] and the fact that the wound was not of a type

[6] Miss Cullum stated to Felton (*supra*, p. 41) that in the course of her struggle with her assailant she "bit his right hand" (R. 259). At the trial, she similarly testified that she

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that could have been inflicted "by the clean cut of a knife" (which was respondent's explanation of the cause of the wound) (R. 199).

At about 7:15 p. m. of the same day, July 18, in the presence of both British constables (R. 81, 97, 194), the two C. I. D. agents who had been investigating the cases (R. 81), and others (see p. 19, *infra*), Todd conducted a line-up, or identification parade, consisting of 16 soldiers, including respondent. At this time, both girls, independently of each other and without hesitation, identified respondent as their attacker[7] (R. 32-33, 81, 97, 194-196). Immediately following the girls' identification of respondent, both gave Felton brief additional statements, supplementing their original statements to him (*supra*, pp. 9, 11), attesting to the fact of their having identified respondent at the line-up (R. 93; R. 260, 90[8]).

On the following day, July 19, 1944, respondent's commanding officer, Captain Ernest MacGregor, who had been present at the identification parade at which respondent was identified as the assailant (R. 32, 81), filed formal written charges accusing respondent of the offenses (R. 73-76), and

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"bit his hand," but without specifying which (R. 167, 175). Asked on cross-examination if she "bit him on the right hand," she replied "I didn't say I bit him on the right hand. I just said I bit his hand" (R. 175).

[7] Both girls also identified respondent as their assailant at the trial (R. 127; 168).

[8] See "Stipulation correcting errors in the printed record" (R. 296).

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5. The accused, after he had been carefully warned by me as above indicated, said that he did not desire to make a statement.

* * * * *

As indicated in the above-quoted excerpt from his report, Todd attached to and made a part of his report three exhibits, A, B, and C (R. 85-99, 258-260), which contained the substance of the statements given to him by the witnesses whom he had personally interrogated, and also certain documentary evidence examined by him, this documentary evidence consisting principally of certified copies of the statements previously given to constable Felton by the two girl victims and the five other English civilian witnesses whom Felton had interviewed. The contents of these three exhibits, more particularly described, were as follows:

Exhibit A (R. 85-89) contained Todd's summaries of the statements made to him by 15 of respondent's fellow soldiers, whom Todd personally interrogated at respondent's request, and by whose testimony respondent sought to establish an alibi.

Exhibit B (R. 258-260, 90-97) consisted of certified copies of (1) Miss Dale's original (*supra*, p. 9) and supplementary (*supra*, p. 13) statements to constable Felton (R. 91-93); (2) Miss Cullum's original (*supra*, p. 11) and supplementary (*supra*, p. 13) statements to Felton (R. 258-260, 90[9]); (3) the statements given to Felton by the

[9] See "Stipulation correcting errors in the printed record" (R. 296).

five other English civilian witnesses whom Felton had interrogated (*supra*, pp. 9-11) (Dr. Beckett, R. 95-96; Mrs. Ellen Dale, R. 94-95; Pamela Dale, R. 93-94; Betty Goodall, R. 96; Welham, R. 90); and (4) a statement by Felton himself summarizing his activities in connection with the investigation (R. 96-97).

Exhibit C (R. 97-99) consisted of summaries of statements given by Miss Dale and Miss Cullum to Todd in the course of his pre-trial investigation. These statements further supplemented their earlier statements to Felton, as contained in Exhibit B.

Beneath Miss Dale's statements to Felton (original and supplementary), as they appeared in Exhibit B to Todd's report, was the following notation (R. 93):[10]

> Original statements in the pocket book of P. c. 305 Felton, Pages Nos. 112-119, and 141, taken at 10.30 am. 12.7.44 at Dr. Beckett's Surgery, Manningtree, and at 7.45 pm. 18.7.44 at Raydon Aerodrome, respectively.
>
> Certified True Copy.
> (S.) E. W. SHEPHERD,
> *Detective Sergeant.*
>
> A True Copy.
> ALAN B. TODD,
> *1st Lt. Inf.*

Similar notations appeared beneath Miss Cullum's statements to Felton (original and supple-

[10] This is the notation which is reproduced in the majority opinion below (R. 278-279).

impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior

authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. [Italics supplied.]

STATEMENT

On August 26, 1944, the respondent, Bernard W. Smith, a private in the United States Army, was convicted in England by an Army general court-martial of rape and assault with intent to commit rape, in violation of the 92d and 93d Articles of War (10 U. S. C., 1946 ed., 1564 and 1565), respectively, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and imprisonment for life (R. 73-75, 251-252). The proceedings and record of the trial were thereafter reviewed by two separate Army reviewing authorities—the Staff Judge Advocate of the Eighth Fighter Command (R. 59-73) and Board of Review No. 1, Branch Office, Judge Advocate General, European Theater of Operations (R. 42-58)—both of which found the record legally sufficient to support the findings and sentence. The findings and sentence were

custody (R. 287) on the ground that AW 70 had not been substantially complied with in that the pretrial investigation provided for by that Article had not been thorough and impartial (R. 277-281, 284). The majority also held—necessarily, in view of their decision declaring the court-martial sentence void—that compliance with AW 70 is a jurisdictional prerequisite to a valid trial by general court-martial (R. 281-284). The dissenting judge assumed, *arguendo*, that compliance with AW 70 is such a jurisdictional prerequisite (though he was of the view that "the proposition is open to grave doubt" (R. 284-285)), but expressed the conviction that the District Court's finding of fact that there had been compliance with AW 70 in this case was fully justified and that the majority's reasons for rejecting the District Court's finding in this respect were "inadequate" (R. 285-287).

The relevant facts may be summarized as follows:

Late in the evening of July 11, 1944, an American soldier assaulted and attempted to commit rape upon an English girl named Miriam Cullum as she was returning to her home on a lonely roadside in England. He abandoned the attempt and fled, however, when two passers-by approached. Shortly before the attack, the soldier had accosted Miss Cullum and a companion, Mrs. Kerry, as they were wheeling their bicycles along the road, and had

where he interviewed and took a statement from her mother, Mrs. Ellen Dale (R. 94-95).

On the following day, July 13, 1944, at the request of an officer of a military police company of the United States Army, to whose attention the rape of Miss Dale had been brought, the Criminal Investigation Division of the United States Army also commenced an investigation of the crime, and two agents of the Criminal Investigation Division (hereafter referred to as the C. I. D.) were assigned to the case (R. 79). These agents, on the same day, "contacted the [British] civil police at Mistley, Essex," and, accompanied by constables Felton and Chaplin, visited the scene of the rape and interviewed the owner of a nearby public house (R. 81). The C. I. D. agents and the British constables then went to the place of employment of Sheila Dale's sister Pamela, who had been with Sheila shortly before the attack upon the latter and had arrived home a little before her (R. 93-94, 119-120, 127), and Felton interviewed and took a statement from Pamela (R. 81, 93-94). In the afternoon of the same day, July 13, Felton interviewed and took a statement from a young girl named Betty Goodall, who had been at the Marsh Cottage on the night of the attack on Miss Dale and had heard two screams from nearby (R. 96). Later on the same day, the C. I. D. agents went to Sheila Dale's home, interviewed her, and made arrangements "to have her keep an appointment

[which she had] made with an unknown American soldier at Brantham, Suffolk" (R. 81).[4] The agents, accompanied by constables Felton and Chaplin, went to the agreed upon trysting place in Brantham later that day and "observed the place of appointment but no American soldier kept the appointment" (R. 81).

Three days later, on July 16, 1944, the unsuccessful rape attempt on Miss Cullum (see pp. 8-9, *supra*) came to the attention of the British police (R. 197). On the following day, July 17, constable Felton interviewed and took a statement from Miss Cullum (R. 97, 192; R. 258-260, 90[5]), and later the same day he interviewed and took a statement from one Welham (R. 90), who was one of the two passers-by whose approach caused Miss Cullum's assailant to abandon his attempt to rape her (R. 168-169, 260; *supra*, p. 8). Felton notified the C. I. D. agents of the Cullum attack on the following day, July 18 (R. 81).

On the same day, July 18, 1944, some time prior to 3:15 p. m., constables Felton and Chaplin "visited the U. S. A. A. F. Aerodrome at Raydon, Suf-

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[4] Miss Dale testified at the court-martial trial, and also stated in her statement to Felton (*supra*, p. 9), that after her assailant had raped her, he "wanted to see me another night," and that she, hoping that "if I said I would he would let me go" and "frightened that he would start everything all over again" if she refused, told him she would meet him "on Thursday night [July 13] at 7 o'clock" at a designated location in the vicinity (R. 126, 92).

[5] See "Stipulation correcting errors in the printed record" (R. 296).

on the day after that, July 20, Lieutenant Todd was designated to investigate the charges in accordance with the 70th Article of War (R. 99).

Lieutenant Todd conducted the AW 70 investigation on July 21, 22, and 23, 1944 (R. 85, 86, 88, 97), and on July 24th (R. 83, 99), he submitted his "Pretrial Investigating Officer's Report" (R. 83-100), in which he recommended trial by general court-martial (R. 84). In this report, Todd stated (R. 83-84):

> 1. I have investigated the inclosed charges dated 19 July 1944 against Bernard W. Smith, 32286877, Pvt. Hq. Det., 353rd Fighter Group, APO 637, U. S. Army in accordance with the provisions of Article of War 70 and paragraph 35a, Manual for Courts-Martial. At the outset of the investigations, I informed the accused of the nature of the charges alleged against him; of the names of the accuser and witnesses, so far as known to me; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement with reference to the charges against him, but that if he did make one it might be used against him.
>
> 2. In the presence of the accused, I have examined the following-named witnesses and

documentary evidence and have reduced the material testimony given by each witness under direct and cross examination, to a statement embodying the substance of the testimony taken on both sides, which said statement is attached hereto as hereinafter indicated:

For the Accused: As shown on Exhibit A.

The following two witnesses against the accused were examined by me in his presence and he was allowed to examine and cross-examine them with my assistance: Miriam Florence Cullum and Sheila Winifred Dale. Their testimony substantiated their statements shown on Exhibit B, with additional matter as shown on Exhibit C.

3. The substance of the expected testimony of the following-named witnesses in written form was made known to the accused who stated he did not desire to cross-examine such witnesses and therefore the same were not called or examined in the presence of the accused.

Frank Albert Welham, Pamela Joy Dale, Mrs. Ellen May Dale, Frederick Harry Eli Beckett, Betty Goodall, Wilfred John Felton. Statements of these witnesses are included in Exhibit B.

4. The following documents have been examined, shown to the accused, and are appended:

Exhibits A, B, and C.

mentary), as they appeared in Exhibit B to Todd's report (R. 90),[11] as well as beneath each of the statements of the five other English civilian witnesses to Felton appearing in that exhibit (R. 90, 94, 95, 96). Felton's own statement (*supra*, p. 17), as it appeared in Todd's exhibit B (R. 97), was similarly indicated to be a "true copy" certified by Detective Sergeant Shepherd[12] and re-certified by Todd.

On August 9, 1944, sixteen days (cf. p. 14, *supra*) after Lieutenant Todd's submission of his "Pretrial Investigating Officer's Report" recommending respondent's trial by general court-martial, a general court-martial was appointed to meet on August 10, 1944, "or as soon thereafter as practicable" (R. 110-111). The "Detail for the Court" included Lieutenant Todd as assistant trial judge advocate, *i.e.*, assistant prosecutor (R. 111). The trial (R. 109-251) took place on August 25 and 26, 1944 (R. 104).

At the habeas corpus hearing (R. 9-37), Lieutenant (then Captain) Todd took the stand and told of the two British constables coming to his office on July 18, 1944; their telling him about the attacks on the two English girls (this being his first knowledge of the matter); his summoning of soldiers at the constables' request, for question-

[11] See "Stipulation correcting errors in the printed record" (R. 296).

[12] Shepherd was evidently another British police officer.

ing; and his subsequent[13] conduct of the line-up in which respondent appeared and was identified by the girls as their assailant (R. 31-33). Todd testified that respondent stated to him, in the presence of respondent's commanding officer, Captain MacGregor, that he had no objection to appearing in the line-up (R. 32, 33). Todd also testified that, to insure fairness in the conduct of the line-up and "to protect [respondent's] rights," "the Chaplain of the Field, the Executive Officer of the Field, and several others," in addition to respondent's commanding officer, were present at the line-up as witnesses (R. 32). The English girls identified respondent separately, Todd testified, and there "seemed to be no hesitation in their identification" (R. 33). Todd also stated that he subsequently

[13] Todd testified that he was "certain" that he conducted this line-up some time after he had been appointed as the AW 70 investigating officer, and that his "best judgment" was that the line-up occurred "approximately a week" after the interrogation of respondent by the constables and Todd in the latter's office (R. 36; *see* also R. 32). It is clear from the court-martial record, however, that Todd was mistaken in these respects. The record indicates that the line-up was conducted on the evening of July 18, 1944, the same day that respondent was interviewed in Todd's office, and two days before Todd's appointment as the AW 70 investigating officer (*supra*, pp. 11, 12, 13-14). Todd's mistake in these respects may have been due to his confusion as to the date of his initial interview with respondent (July 18) (see R. 31, 32, 36). The record of the habeas corpus hearing indicates that Todd's confusion in respect of dates would have been promptly cleared up if he could have been advised as to "the exact date" of his appointment as the AW 70 investigating officer (which date he could not independently recall), but the matter was not cleared up because it was thought that the court-martial record did not indicate the date of his appointment (R. 36).

"asked Smith if he thought the line-up was conducted in a fair manner and he said it was," though "he still protested his innocence" (R. 33).

Todd further testified that when he was appointed as the AW 70 investigating officer he "was perfectly of a fair mind" and only "wanted to get at the truth of the matter" (R. 33). At the start of the investigation, he testified, he advised respondent that he could make a statement or not, as he chose, and that he could be present at the interrogation of all witnesses and examine them himself. Respondent did in fact accompany Todd whenever the latter went to question witnesses, Todd stated, and was given full opportunity to, and did, cross-examine them. Todd further testified that respondent requested him to call certain witnesses in his own behalf to substantiate his defense of alibi. Todd did call and question such witnesses, he said, and permitted respondent to question them. (R. 34.)

Todd further testified that he did not interrogate Mrs. Kerry [14] in the course of the AW 70 investigation because (R. 35)—

> So far as from a prosecution standpoint it was not necessary. As far as from the Defense standpoint, I asked Smith if he wanted her and he said "No."

[14] Mrs. Kerry, it will be recalled (see pp. 8-9, *supra*), was the woman who had been in the company of Miss Cullum when they were first accosted by Miss Cullum's assailant, shortly before his attack on her.

Respondent, who preceded Todd as a witness at the habeas corpus hearing, had testified (R. 20) that in the course of the AW 70 investigation, following Todd's interrogation, in his presence, of the two girl victims, Todd—

> * * * asked me if I was satisfied about talking to these girls. He was rather fair and so he said you have one other witness here a Mrs. Kerry, she lives in Brantham. He asked me if I wanted to see her. I didn't know exactly whether I did or not. I said I would let him know. He said "You said this Mrs. Kerry cannot identify you, she has never seen you; so if you go there and talk to this woman she will know what you look like so my advice to you would be to wait until it comes up, and if she can't identify you it will be a point for you."

Todd denied having given any such advice as that attributed to him by respondent. "No such conversation took place," he stated (R. 35).

SUMMARY OF ARGUMENT

In ordering the respondent discharged from confinement under the sentence of an Army court-martial, the Court of Appeals held (1) that the pre-trial investigation of the charges against respondent did not comply substantially with AW 70 in that such investigation was neither thorough nor impartial, and (2) that the proceedings of the court-martial were therefore a nullity for lack of

jurisdiction, i.e., that compliance with AW 70 is a jurisdictional prerequisite to the validity of subsequent court-martial proceedings. Under any construction of AW 70, it is clear that only substantial (as opposed to literal and technical) compliance is required, not only by reason of the preliminary nature of the pre-trial investigation but also because of the harmless error rule contained in AW 37. We contend that the pre-trial investigation in this case complied fully with AW 70 and that, in any event, compliance with AW 70 is not a jurisdictional prerequisite to valid trial and conviction by an Army court martial.

I

The pre-trial investigation conducted by Lieutenant Todd complied with AW 70. He fully advised respondent as to all of his rights at this investigation, and respondent in fact took full advantage of all such rights. Todd testified at the habeas corpus hearing that he undertook the investigation with an unbiased mind, and the District Court accepted his testimony as true. The Court of Appeals' reasons for finding that the investigation lacked thoroughness and impartiality—namely, Todd's failure to question the witness Mrs. Kerry, his subsequent appointment as assistant trial judge advocate at the trial, and the fact that he participated in the preliminary investigation which preceded the AW 70 investigation—are insubstantial.

A. Todd's failure to question Mrs. Kerry during the pre-trial investigation showed no lack of impartiality since, as the District Court found, respondent had affirmatively indicated to him that he did not desire Mrs. Kerry to be interrogated. Neither did the failure to question Mrs. Kerry indicate lack of thoroughness on Todd's part. For it was not necessary that Todd call this witness in view of the positiveness of both victims' identification of respondent as their assailant. Todd was conducting a *pre-trial* investigation of charges; he was not finally determining respondent's guilt or innocence. His investigation was sufficiently "thorough" when he became convinced that, regardless of what else he might uncover by further investigation, he had no alternative to recommending a general court-martial trial. No matter what Mrs. Kerry might have said to him—even if she were able positively to state that respondent was not the man who accosted her and Miss Cullum shortly before the attack on the latter—Todd still would have had to recommend trial in view of the evidence already in his possession. A "thorough" investigation, therefore, did not require him to question Mrs. Kerry even against respondent's wishes.

B. Todd's subsequent designation, sixteen days after completion of his AW 70 investigation, as assistant trial judge advocate at the court-martial trial, obviously cannot be construed as reflecting

either on the thoroughness or the impartiality of his conduct of that investigation.

C. Todd's brief and routine role in the preliminary investigation, which preceded the filing of the charges which he later investigated pursuant to AW 70, did not preclude him from entering upon his duties as the AW 70 investigating officer free of bias, as he testified he did. His participation in the preliminary investigation was strictly limited and incidental. It consisted, in essence, of routine cooperation, in his capacity as Provost Marshal of respondent's station, with the British police and the agents of our Army's Criminal Investigation Division, who were the true preliminary investigators. Todd's cooperation, moreover, was limited to the final few hours of a week-long investigation conducted by those other officials. He had not even heard of the incidents under investigation prior to that time. His cooperation consisted of summoning suspect soldiers at the request of the British police, joining with the police in questioning them, and conducting an identification line-up, at which respondent was identified by the girl victims as their assailant. That was the full extent of his participation in the preliminary investigation. All that he did could have been done just as properly in the capacity of an AW 70 investigating officer, and the fact that he did the same things immediately prior to his appointment as such

clearly did not deprive the respondent of the benefits of AW 70.

The majority were mistaken in supposing that he interrogated the girls prior to his appointment as AW 70 investigating officer. He clearly was not "the real accuser". He did not prefer the charges. He was not harmed by respondent's crimes. And it was not he, but the girl victims, who identified respondent at the line-up.

The purpose of the pre-trial investigation prescribed by AW 70 is to prevent the trial of flimsy and groundless charges and to dispose of minor offenses otherwise than by trial by a general court-martial. In this case, these purposes were satisfied when the pre-trial investigator had informed himself that there was substantial evidence that respondent had committed a serious crime, notwithstanding a significant conflict in the evidence. At that point, it was clear that referring the case for trial by general court-martial would present to such a tribunal matters which were neither flimsy nor minor. It was then obvious that every consideration of justice to respondent and the maintenance of discipline in a friendly foreign country required the ascertainment of the facts by a tribunal with appropriate powers. The purposes of AW 70 were satisfied.

II

In any event, failure to comply with AW 70 is not a jurisdictional defect vitiating the entire court-

martial proceeding. The respondent, a person subject to military law, was tried by a properly constituted court-martial for offenses against military law. Nothing in the nature and purposes of AW 70, nor in its history prior and subsequent to its enactment in 1920, suggests that Congress intended compliance with AW 70 to constitute a jurisdictional limitation on Army courts-martial. In fact, all of the evidence is to the contrary.

The purpose of AW 70 is to prevent the trial of groundless charges or minor offenses by a general court-martial. The result is dual: to save the accused from the opprobrium and inconvenience of unwarranted trial, and to save the Army the expense and inconvenience of unnecessary general courts-martial. However, by its very nature, the AW 70 investigation is preliminary and nondecisive. The investigating officer can only recommend trial by a general court-martial; the decision to try the charges before such a court can be made only by the higher commander. And, of course, the ultimate determination of guilt or innocence is by the court-martial, subject to review by higher authority.

The fact that the AW 70 investigation differs from the *ex parte* accusatory procedures of civil law in that under AW 70 the accused participates to an extent generally unknown to grand jury proceedings, does not alter the tentative character of the investigation. To the contrary, while a grand jury may refuse to indict, the AW 70 investigating officer can

only recommend that the charges be disposed of otherwise than by a trial by a general court-martial. The advisory and informal nature of the AW 70 investigation is further emphasized by the fact that the investigating officer, unlike the grand jury and the court-martial, has no subpoena power, and the accused until 1949 was not entitled to counsel at this stage. Nevertheless, by analogy, the non-jurisdictional nature of defects in grand jury procedure strongly suggests that compliance with AW 70 does not condition the jurisdiction of an Army court-martial. This conclusion is further compelled by the fact that Congress has never inserted in the Articles for the Government of the Navy any requirement equivalent to AW 70.

The legislative history of AW 70, both prior and subsequent to its enactment in 1920, conclusively demonstrates that Congress never intended compliance with AW 70 to condition the jurisdiction of a court-martial. AW 70 was a codification and expansion of the earlier Army policy of requiring a pre-trial investigation of charges. Nothing in the legislative history of the 1920 enactment suggests a Congressional purpose to create an additional jurisdictional limitation. After one early decision that complete non-compliance with AW 70 was jurisdictional, the Judge Advocate General has consistently interpreted it as non-jurisdictional. In 1946, the House Committee on Military Affairs recommended that AW 70 be amended so as to provide that failure to comply with its provisions

should be jurisdictional error, thus indicating its understanding that in its present form AW 70 is not a jurisdictional limitation. Most significant of all, in 1948, when the Articles of War were extensively revised, Congress, after being specifically informed of the Army's interpretation of AW 70 as non-jurisdictional in nature, reenacted that provision without pertinent change. It is clear, therefore, that Congress has never intended compliance with AW 70 to be a condition precedent to the jurisdiction of an Army general court-martial.

ARGUMENT

In this case, a soldier concededly subject to military law was convicted by a lawfully constituted general court-martial, after a fair trial, of two offenses against the Articles of War, one of which is one of the most serious offenses known to the law; the sentence was approved and confirmed after the record of trial had been painstakingly and exhaustively reviewed (see R. 42-58, 59-73) by the agencies provided by law for that purpose; but, notwithstanding such facts, the conviction has been set aside years later and the convicted person ordered freed, beyond practical possibility of re-trial, because of alleged errors which occurred in the hinterland of the proceedings—alleged procedural irregularities which took place prior to, and had nothing to do with, the actual trial. In the words of Judge Learned Hand in an analogous case (*United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 608

(C.A. 2), certiorari denied, 323 U. S. 790), the result achieved by the court below—

> would grant immunity to the relator for a crime, of which, as the record now stands, he has been lawfully convicted; an immunity based in no sense upon the merits of the trial, but only upon the irregularities in the accusation. *Nothing could more effectively defeat the interests of justice.* [Italics added.]

The Court of Appeals held (1) that the pre-trial investigation of the charges in this case was not thorough or impartial, in consequence of which the requirements of the second paragraph of AW 70, *supra*, pp. 3-4, were not substantially satisfied, and (2) that, by reason of such noncompliance, the court-martial trial was an absolute nullity for lack of jurisdiction. If the court was wrong in either respect, its decision is unsupportable. We submit that it was wrong in both respects.

Under Point I, *infra*, pp. 30-49, we shall assume, *arguendo*, that compliance with AW 70 is a jurisdictional prerequisite to a valid court-martial trial, and will argue that AW 70 was complied with in this case. It is clear that at the most only substantial compliance with AW 70 is required, since Congress has provided in AW 37 (10 U.S.C., 1946 ed., 1508) that "The proceedings of a court martial shall not be held invalid * * * as to any matter of pleading or procedure unless in the opinion of the

reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused * * *."[15] This is the fundamental standard of review in the military, as evidenced by the process of review in this case (R. 42, 71). Under Point II, *infra*, pp. 59-81, we shall contend that, in any event, compliance with AW 70 is not such a jurisdictional condition precedent.

I

The Requirements of AW 70 Were Satisfied in This Case

It is undisputed that Lieutenant Todd, the AW 70 investigating officer, fully advised respondent at the outset of the investigation "of the nature of the charges alleged against him," "of the names of the accuser and witnesses, so far as known," and "of the fact that the charges were about to be investigated". It is likewise undisputed that Todd fully advised respondent "of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation," "of his right to have the investigating officer examine available witnesses requested by him," and of the fact that "it was not necessary for him to make any statement

[15] That this "harmless error" rule is to be applied broadly is emphasized by the proviso "That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles."

with reference to the charges against him, but that if he did make one it might be used against him." (*Supra*, p. 14.) In these respects Todd fully complied with the provisions of AW 70, *supra*, pp. 3-4, and the "Instructions" to pre-trial investigating officers, as contained in the *Manual for Courts-Martial*, 1928 ed., § 35*a*.[16] Todd testified, moreover—and the District Court accepted his testimony as true (see R. 271, and fn. 30 thereto)—that he entered upon his duties as investigating officer with a "perfectly * * * fair mind," desiring only "to get at the truth of the matter" (*supra*, p. 20).

Despite all these facts, however, the majority below held that Todd's investigation was not "thorough and impartial," as required by AW 70, for the following three reasons: (a) Todd failed, in his capacity as AW 70 investigating officer, to call and interrogate Mrs. Kerry (R. 280); (b) Todd subsequently was named assistant trial judge advocate at the court-martial trial (R. 281); and (c) Todd took part in the preliminary investigation, *i.e.*, the investigation which preceded the filing of the formal charges which he subsequently investigated pursuant to AW 70 (R. 278-280). We submit that none

[16] The "Instructions" contained in § 35*a* of the 1949 edition of the *Manual for Courts-Martial* are substantially identical, except that the 1949 edition also requires the investigating officer to inform the accused of his right to counsel at the investigation, in accordance with the revision that became effective February 1, 1949 (see footnote 2, *supra*, pp. 2-3).

of these reasons warrants the conclusion reached that the provisions of AW 70 were not complied with because of a lack of thoroughness and impartiality in Todd's conduct of the pre-trial investigation. And even if it be thought that there had been any departure from the requirements of AW 70, the departure was neither substantial nor prejudicial.

A. *Todd's failure, in his capacity as AW 70 investigating officer, to call and interrogate Mrs. Kerry showed a lack neither of impartiality nor of thoroughness.* 1. The failure manifestly did not show lack of impartiality on Todd's part since, according to Todd's testimony at the habeas corpus hearing (*supra*, pp. 20-21), which the district judge accepted as true (*supra*, p. 31), respondent affirmatively indicated to him that he did not desire this witness to be interrogated. We deem it unnecessary to dwell further on the "impartiality" aspect of the failure to call Mrs. Kerry, for, as we read the opinion below, the majority's criticism of Todd's failure to interrogate this witness is based on their belief that Todd's failure indicated lack of thoroughness in his conduct of the investigation rather than lack of impartiality.

2. Neither can Todd's failure to interrogate Mrs. Kerry reasonably be deemed to evidence lack of thoroughness on his part in the conduct of the pre-trial investigation. According to respondent's testimony, he was at first undecided as to whether to call Mrs. Kerry as a witness, but finally decided,

at Todd's suggestion, to forego calling her (*supra*, p. 21). Todd, however, denied making any such suggestion, and stated that he refrained from summoning this particular witness for the twofold reason that her testimony was unnecessary "from a prosecution standpoint," and that respondent affirmatively indicated to him that he did not desire this witness to be called on his behalf (*supra*, pp. 20-21). And the district judge stated in his opinion that "After hearing and seeing the witnesses this Court would accept Lt. Todd's testimony on this matter" (R. 271, fn. 30; cf. R. 274, and fn. 50 thereto). More important, what the majority below seem to have overlooked is the fact that what Todd was conducting was a *pre-trial* investigation of charges. He was not finally determining respondent's guilt or innocence. He was not required to convince himself beyond a reasonable doubt of respondent's guilt in order to recommend that he be brought to trial. It would be the function of the court-martial to hear all available evidence both sides had to offer and on the basis of such evidence to adjudge respondent guilty or innocent.

Todd knew that both of the English girls had positively, unhesitatingly, and independently of each other, identified respondent as their attacker. What purpose, from a *pre-trial* investigator's point of view, would have been served by questioning Mrs. Kerry under the circumstances? If she, too,

identified respondent as the soldier who accosted her and Miss Cullum before the attack on the latter, her testimony would merely have corroborated the victims'. If she was unable to identify him, her testimony would have been merely negative in character, and hence could have had no influence one way or the other on Todd's decision to recommend trial. And even if it be assumed that she could and would have positively stated that the man who accosted her and Miss Cullum was not respondent—the hypothesis most favorable from his standpoint—such testimony would clearly not have justified Todd in failing to recommend a court-martial trial. For on that assumption, while Mrs. Kerry's testimony would of course have cast doubt upon the victims' identification of respondent, it is plain that it could have done no more than that. Todd would still have been required, in view of the two victims' positive identification of respondent, to recommend that he be brought to trial, where the issue created by the conflicting testimony could be resolved by the tribunal created for that purpose, the court-martial.[17]

We submit that the dissenting judge was clearly correct in saying that "there is no basis for requir-

[17] It should be noted that any testimony Mrs. Kerry might have given would have related only to the identification of the person who assaulted Miss Cullum. Thus, there is no complaint as to the thoroughness of the pre-trial investigation of the charge of raping Miss Dale. The latter charge alone would support respondent's sentence. *Kelly* v. *Pescor*, 156 F. 2d 632 (C.A. 8), certiorari denied, 329 U.S. 790.

ing that an investigation, in order to be thorough and impartial, seek out every person mentioned in connection with the affair under scrutiny * * *" (R. 286). For there is nothing in AW 70 which requires the pre-trial investigating officer to examine *all* available witnesses. He must, it is true, examine all available witnesses *requested by the accused*. And he also must afford the accused full opportunity to cross-examine all available witnesses against him if he desires to do so. But, apart from those requirements, the investigation is sufficiently "thorough" within the meaning of AW 70 when the investigating officer has convinced himself, from the witnesses and evidence he has examined, that a general court-martial trial is called for, and that nothing further which he might uncover could reasonably justify him in failing to recommend such a trial.

That this is the proper interpretation of the "thoroughness" requirement of AW 70 is clearly indicated by § 35*a* of *Manual for Courts-Martial*, 1928 ed. "The [AW 70] investigation," it is there stated, "should be prompt, dignified, and military. It should also be as brief as is consistent with thoroughness and fairness, and should, therefore, not include any examination or cross-examination into matters *not essential to determine the necessity of trial*" [italics added]. And later in the same section it is stated that "All available wit-

nesses *who appear to be reasonably necessary* for a thorough and impartial investigation will be called and examined in the presence of the accused" [italics added].[18] The *Manual for Courts-Martial* was promulgated by the President "for the government of all concerned" and was directed to have full "force and effect in the Armies of the United States on and after April 1, 1928" (*id.*, p. IX). And the President's promulgation of the rules, regulations, and instructions contained in the *Manual for Courts-Martial* is expressly authorized by AW 38 (10 U.S.C., 1946 ed., 1509).[19] Consequently, the above-quoted instructions of the *Manual for Courts-Martial,* embodying as they do an interpretation of AW 70 by the President and Commander in Chief—an interpretation that is clearly reasonable, as we have shown—are entitled to great weight in the judicial construction of the "thoroughness" provision of that Article. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Boutell* v.

[18] The substance of the quoted provisions is repeated in § 35*a* of the 1949 edition of the *Manual for Courts-Martial.*

[19] "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals * * *: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: * * *." See also 10 U.S.C., 1946 ed., 16: "The President is authorized to make and publish regulations for the government of the Army in accordance with existing laws, which shall be in force and obeyed until altered or revoked by the same authority: *Provided*, That said regulations shall not be inconsistent with the laws of the United States." Compare, in respect of Navy "orders, regulations, and instructions," 34 U.S.C. 591.

Walling, 327 U. S. 463, 470-471; *Billings v. Truesdell*, 321 U. S. 542, 552-553; *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351-352; *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549.

B. *The fact that Todd was subsequently detailed as assistant trial judge advocate at the court-martial trial, which, as AW 70 investigating officer, he had recommended, can in no way be construed to indicate partiality in his earlier conduct of the AW 70 investigation.*—Lieutenant Todd was appointed as the AW 70 investigating officer on July 20, 1944. He conducted the investigation during the next three days, and on July 24th he submitted his "Pretrial Investigating Officer's Report," recommending that respondent be tried by general court-martial. (*Supra*, p. 14.) *Sixteen days thereafter*, on August 9th, the court-martial was appointed, and Lieutenant Todd was named as assistant trial judge advocate at the trial, which took place a few weeks later, on August 25th and 26th (*supra*, p. 18).

It is thus clear that when Todd was appointed assistant trial judge advocate at the court-martial trial, his work as pre-trial investigating officer had long since been completed and his report filed. With the dissenting judge (R. 286), therefore, we simply cannot comprehend how Todd's subsequent appointment as assistant trial judge advocate can in any way be construed to support the majority's

conclusion that Todd did not conduct a thorough and impartial pre-trial investigation.[20]

If Todd knew, or even had grounds to believe, at the time he conducted the AW 70 investigation, that he would be a member of the prosecutor's staff in the event that he recommended trial by general court-martial and his recommendation was followed, there might conceivably be some justification for the view that his AW 70 investigation was not, or possibly might not have been, conducted with the degree of impartiality required by that Article. But there is absolutely nothing in the record to indicate that Todd had any such knowledge, or grounds for such a belief, at the time of the AW 70

[20] Indeed, it would seem that the majority judges themselves, at least implicitly, recognized the illogic of the view that Todd's appointment as assistant prosecutor could be construed to reflect on the impartiality of his prior conduct of the AW 70 investigation. "The transcript does not reveal [Todd] as actually examining [at the trial]," the majority stated, "but with the case prepared by him from the beginning it is reasonable to assume that he was of considerable pre-trial and trial assistance to the trial judge advocate" (R. 281). If we correctly understand this observation of the majority, their point was that Todd, by virtue of his acquaintance with the facts in the case, acquired as a result of his having conducted the AW 70 investigation, was in a position to be particularly helpful to the trial judge advocate in preparing for the trial and at the trial itself. This was undoubtedly true. But that fact still does not meet our contention, and that of the dissenting judge, that Todd's appointment as assistant trial judge advocate—whether he was particularly helpful in that capacity or only ordinarily so—cannot be related back to the time when he conducted the AW 70 investigation, so as to evidence lack of impartiality or thoroughness in the conduct of that investigation. And it was solely upon their belief that AW 70 was not substantially complied with in this case, it must be remembered, that the majority based their conclusion that the court-martial lacked jurisdiction (R. 281-284).

investigation. The record, indeed, quite clearly indicates the contrary, since it contains Todd's testimony at the habeas corpus hearing, which the district judge believed (*supra*, p. 31), that when he conducted the AW 70 investigation he "was perfectly of a fair mind" and only "wanted to get at the truth of the matter" (*supra*, p. 20). In any event, the majority below did not purport to base their conclusion that Todd was partial in his conduct of the AW 70 investigation on any supposed knowledge or belief on Todd's part that he might subsequently participate at the trial on the prosecutor's staff.

Benjamin v. *Hunter*, 169 F. 2d 512, 514 (C.A. 10), presented a factual situation on all fours with the instant case in respect of the point now under discussion. In that case, two days after the AW 70 investigating officer had completed his investigation and submitted his report recommending trial by court-martial, the court-martial was appointed and the officer who had made the AW 70 investigation was designated as assistant trial judge advocate of the court. The Tenth Circuit held that the fact that the AW 70 investigating officer was later appointed to the prosecutor's staff was in nowise indicative of his having failed to make a thorough and impartial pre-trial investigation. Indeed, the point was scarcely discussed by the court in the *Benjamin* case. The fact in that case to which the court

gave principal attention, but notwithstanding which it held AW 70 to have been substantially complied with, was the fact—not present in the case at bar—that the AW 70 investigating officer, several weeks before he was named as such, had been appointed assistant trial judge advocate of another court-martial, which had been appointed, not for the trial of any specific case, but generally "for the trial of such persons as might be brought before it." The record in the *Benjamin* case did not disclose whether the officer in question was still assistant trial judge advocate of this earlier-appointed court, or indeed whether that court was still in existence, at the time of his appointment as AW 70 investigating officer in *Benjamin's* case. But the Tenth Circuit held that, regardless of what the situation may have been in those two respects, it had no bearing on the question of whether the AW 70 investigation of the charges against Benjamin was thorough and impartial, for the reason that the earlier-appointed court-martial "did not have anything to do with the charges against [Benjamin]."[21]

[21] At the time of respondent's court-martial trial, AW 11 (10 U.S.C., 1946 ed., 1482) provided for the appointment, for a general court-martial trial, of a trial judge advocate and a defense counsel, and, when necessary, of one or more assistants to each. The AW 70 investigating officer was not disqualified by AW 11, as it stood at that time, from being subsequently appointed to either the prosecution or the defense staff. Effective February 1, 1949, AW 11 has been amended so as to prohibit a "member [of the court-martial], trial judge advocate, assistant trial judge advocate *or investigating officer* in any case" from subsequently acting "in the same case as defense counsel or assistant defense counsel unless expressly

C. The fact that Todd participated briefly in the preliminary investigation and conducted the line-up which resulted in respondent's identification as the victims' attacker did not preclude him from thereafter conducting a thorough and impartial pre-trial investigation.—The third ground relied on by the majority below as showing lack of impartiality and thoroughness on Todd's part during the pre-trial investigation—namely, that he participated to some extent in the preliminary investigation preceding the filing of the formal charges which he later investigated as AW 70 investigating officer (R. 278-280)—is equally unsubstantial.

Todd's participation in the preliminary investigation was strictly limited and incidental. It consisted, in essence, of routine cooperation, in his

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requested by the accused," and likewise to prohibit a "member, defense counsel, assistant defense counsel, *or investigating officer* in any case" from subsequently acting "in the same case as a member of the prosecution" [italics supplied]. See Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II, §§ 208, 244. Thus, under the law as it now stands, the pre-trial investigating officer may not subsequently be detailed either to defend the accused (except at the latter's request) or to assist in his prosecution. But, as we have stated, no such prohibition was in effect at the time of respondent's trial. Whatever may have been the reasons or policy considerations underlying the recent amendment of AW 11, it is clear that all that the amendment was designed to accomplish was to disqualify the pre-trial investigating officer (and the other officers mentioned) from subsequently acting in the capacities specified. But the amendment of AW 11 in nowise refutes our contention that the majority opinion below—attributing partiality to the pre-trial investigation by virtue of the fact that the officer who conducted it was subsequently named to the prosecution staff—is to that extent logically infirm.

capacity as Provost Marshal of the Army base at which respondent was stationed, with the British police and the agents of our Army's Criminal Investigation Division, who were the true preliminary investigators of the offenses. Todd's cooperation, moreover, was limited to the final few hours of a week-long investigation. The preliminary investigation had been in progress for a week before Todd ever heard of the incidents that were being investigated. The investigation began on the morning of July 12, 1944, the day following the attacks on the two English girls, when Felton, the British constable in charge of the investigation initiated by the local civilian police, started to interview witnesses in connection with the rape of Miss Dale, took possession of certain material evidence, and visited the scene of the rape (*supra*, p. 9). The C.I.D. agents joined in the investigation on the following day, July 13, the rape of Miss Dale having in the meantime come to the attention of our military authorities (*supra*, p. 10). The C.I.D. agents thereafter worked hand in hand with Felton and the British police, interviewing additional witnesses and otherwise carrying on a routine police investigation (*supra*, pp. 10-11). On the fifth day of the investigation, July 16, the attempted rape of Miss Cullum came to the attention of the British police and thus was brought within the scope of their investigation (*supra*, p. 11). On the following day, July 17, Felton interviewed other wit-

nesses, relative to the Cullum case, and on July 18 notified the C.I.D. agents of this second crime (*supra*, p. 11).

It was on the latter date, July 18—one week to the day after the occurrence of the attacks, and the seventh day of the investigation—that Lieutenant Todd first learned of the matters under investigation (*supra*, pp. 11-12). It was on that day that constables Felton and Chaplin called on Todd, the Provost Marshal of Raydon Aerodrome, informed him of the attacks and the investigation which had been carried on by them and the C.I.D. agents, furnished him with a description of the soldier-assailant as supplied by the girl victims, and asked him to cooperate with them in their investigation by summoning various suspect soldiers for questioning (*supra*, pp. 11-12). Todd summoned suspects as requested and, with the constables, interrogated them (*supra*, p. 12). When the facts known to the British constables seemed to point to the guilt of respondent, who was one of the soldiers interrogated, Todd further cooperated with the constables to the extent of conducting the identification line-up which resulted in the identification of respondent by both of the complaining witnesses. That was the full extent of Todd's participation and assistance in the preliminary investigation.

The record does not support the statement of the majority of the court below that Todd "would seem-

to have interviewed the girls that same evening [*i.e.*, the evening of the lineup]" (R. 278). This conclusion was based upon the fact that Todd certified or authenticated copies of the girls' original and supplementary statements to Constable Felton as being true copies of those statements; and upon the assumption that "Exhibit B for the defense referred to at the trial as 'Statement of Sheila Dale to Lieutenant Todd' appears to be the record of such an interview" (R. 278-279). To the contrary, it is clear from the form of Todd's certification (*supra*, pp. 17-18) that he was merely performing an authentication function. The statements on their face indicate that they were made to Felton before Todd had heard of the case, except for the last paragraph of each relating to the identification lineup. Also, the same form of certification by Todd appears on copies of statements by five other witnesses who were admittedly not interviewed by Todd at any time. As to defense Exhibit B (R. 258-260) it shows on its face that it is simply Miss Cullum's original and supplemental statement to Constable Felton. Thus, there is nothing in the record to show that Todd interviewed either Miss Dale or Miss Cullum prior to his appointment as AW 70 investigator.[22]

[22] As Todd testified at the habeas corpus hearing, his certification was merely his attestation that the statements were "a true copy of something the Dale girl [and the Cullum girl] said to the Constable [Felton]" (R. 36). Todd did not personally interrogate either girl until after he was appointed AW 70 investigating officer. See Todd's statement in his "Pre-

In brief, Todd, as Provost Marshal cooperated briefly and routinely with the preliminary investigators in the last few hours of their week-long investigation. He clearly was not "the real accuser", as stated by the majority of the court below (R. 284). It was not Todd who preferred the formal charges against respondent, but the latter's commanding officer, Captain MacGregor (*supra*, p. 13), who had been present at both the questioning of respondent by the British constables and the identification lineup (R. 14, 15, 16). Obviously it was not Todd who was injured by respondent's alleged crimes.

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trial Investigating Officer's Report" that he examined Miss Dale and Miss Cullum in respondent's presence in the course of the AW 70 investigation, and that "Their testimony substantiated their statements shown on Exhibit B [to Todd's report, consisting of certified copies of the statements of the two girls and the other civilian witnesses to Felton], with additional matter as shown on Exhibit C [to Todd's report]" (*supra*, p. 15).

The majority's statement that "Exhibit B for the defense referred to at the trial as 'Statement of Sheila Dale to Lieutenant Todd' appears to be the record of such an interview" is confusing and misleading. We have been unable to find where in the record "Exhibit B for the defense" was "referred to at the trial as 'Statement of Sheila Dale to Lieutenant Todd'." As a matter of fact, the defense's Exhibit B at the trial consisted of *Miss Cullum's* original and supplementary statements to *Felton* (see R. 258-260; cf. "Stipulation correcting errors in the printed record," R. 296), and the defense's exhibit A at the trial consisted of Miss Dale's original and supplementary statements, also made to Felton (see R. 139, 255-258). It is true that just prior to the reception in evidence of defense exhibit B, defense counsel, referring to this exhibit, said to Miss Cullum, the witness on the stand, "I hand you the statement you made to *Lt. Todd* and ask you to look at it. Is that the statement you made to him?" [italics added], to which Miss Cullum replied, "Yes" (R. 176). This inaccurate answer of Miss Cullum's is explainable, however,

To summarize, it seems that Todd's most significant connection with the pre-charge investigation was that in cooperation with the British police and the C. I. D. agents he conducted the line-up at which respondent was identified as the guilty person. We submit that this in no way precluded him from entering upon his duties subsequently as the AW 70 investigating officer with a fair and unbiased mind (cf. *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2), discussed *infra*, pp. 47-49), as he testified he did (*supra*, p. 20). Impartiality means something other than complete ignorance of a matter. "In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 703.

In any event, all that is alleged raises only the question of whether Todd was disqualified to act as AW 70 investigating officer because prior to the filing of the charges he had done some of the things that would properly have been part of the AW 70

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by the facts (1) that she was interviewed by and gave a statement to Lieutenant Todd in the course of Todd's AW 70 investigation and (2) that her statement to Todd "substantiated" (as Todd said in his "Pretrial Investigating Officer's Report," *supra*, p. 15) her previous statements to Felton (as contained in Exhibit B to Todd's report). In short, Miss Cullum told her story both to Felton (in the course of Felton's preliminary investigation) and to Todd (in the course of Todd's AW 70 investigation); and since both statements covered substantially the same ground, Miss Cullum evidently did not distinguish between the two in giving the affirmative answer to the question put to her at the trial under the circumstances we have just mentioned.

investigation. Certainly, the statute itself contains no such disqualification of every officer who has had any part in the discovery or investigation of an alleged offense. As the District Judge put it: "Whether Lt. Todd participated [in arranging the line-up] as Provost Marshal prior to or as [AW 70] investigator subsequent to his designation is immaterial. It was a proper part of an impartial investigation" (R. 271). That is to say, it would have been a proper part of Todd's AW 70 investigation to have conducted an identification line-up in which respondent appeared by consent (as he in fact appeared in the line-up actually conducted (*supra* p. 19; R. 210, 216)) if such a line-up had not already been conducted. AW 70 requires an impartial investigation, but does not exclude, as partial or biased, every officer who in the course of his duties, and without any showing of prejudice, has already done some of the things which would normally be a part of the AW 70 investigation.

The decision below, to the extent that it holds that AW 70 was not complied with because of the AW 70 investigating officer's limited participation in the pre-charge investigation which preceded the AW 70 investigation, squarely conflicts with *Henry* v. *Hodges*, 171 F. 2d 401 (C.A. 2), now pending before this Court on petition for certiorari, No. 598,[23] reversing *Henry* v. *Hodges*, 76 F. Supp. 968

[23] In another recent decision of the Second Circuit, *Becker* v. *Webster*, 171 F. 2d 762, 764 (C.A. 2), also pending on petition for certiorari as No. 607, it was held, Circuit Judge

(S.D. N.Y.). In that case,[24] one Captain Meyers was directed by his commanding officer to "make a general precharge survey and investigation" of certain shortages of silver bullion. After making an investigation, Captain Meyers filed a report stating in part that "Capt. Henry appears to be the main figure in the affair." Thereupon the commanding officer preferred formal charges of embezzlement against Henry, and appointed Meyers to conduct the pre-trial investigation of the charges required by AW 70. Meyers thereafter filed his AW 70 investigating officer's report recommending that Henry be tried by a general court martial. The Court of Appeals for the Second Circuit held that there was substantial compliance with AW 70, thereby reversing the contrary decision of the District Court that AW 70 had not been complied with in that the AW 70 in-

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Frank dissenting, that that provision of AW 70 requiring that "At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available" was satisfied under the following circumstances: The AW 70 investigating officer, after being unsuccessful in eliciting anything of value from a certain witness in his first examination of her in the presence of the accused and his counsel, thereafter, on reexamining her in the absence of the accused and his counsel, elicited important statements incriminating the accused. The investigating officer then offered to show the witness' statement to the accused's counsel and told counsel that, if he wished, he might recall the witness and cross-examine her in the accused's presence, which counsel declined to do on the ground that cross-examination would be useless after the direct had been taken in the accused's absence.

[24] The facts are taken from the District Court's opinion (176 F. Supp., at 970-971) as well as from the opinion of the Court of Appeals (171 F. 2d at 402).

vestigating officer was "in fact the accuser."[25] It is clear from the facts in that case that Henry was in no way prejudiced, for Meyers showed him everything that he proposed to act upon, and gave Henry an opportunity to cross-examine any witness and to make a further statement of his own. While we believe that there was substantial compliance with AW 70 in *Henry* v. *Hodges*, it is nevertheless obvious that in the instant case Todd played a far less significant part in the pre-charge investigation than did Meyers in the pre-charge investigation of Henry. In brief, if *Henry* v. *Hodges* was correctly decided, then it must be concluded *a fortiori* that there was substantial compliance with AW 70 here in so far as Todd's connection with the pre-charge investigation is concerned.

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[25] The Second Circuit's opinion also pointed out that "Henry assented to the 'post-charges' investigation without reserve" in that Meyers, during the AW 70 investigation, showed Henry his preliminary report, containing everything he had acted upon and meant to act upon again, and asked Henry whether he wished to cross-examine any witnesses (to which Henry replied that he did not) and whether he wished to make any further statement of his own (to which Henry also replied in the negative) (171 F. 2d, at 402-403). In view of this "assent" on the part of Henry, the Second Circuit stated that "Moreover, the issue [of whether AW 70 was substantially complied with] is not in the case anyway * * *" (171 F. 2d, at 402). The factor of Henry's "assent" to Meyers' conduct of the AW 70 investigation does not, however, distinguish the *Henry* case from the case at bar. For respondent certainly "assented" to Todd's conduct of the AW 70 investigation quite as much as Henry did to Meyers'. Indeed, whereas in the instant case respondent never raised the question of the propriety of Todd's making the AW investigation until he filed his petition for habeas corpus, long after his court-martial trial and conviction (see pp. 6-7, *supra*), Henry vigorously

II

In Any Event, Failure to Comply With AW 70 Is Not a Jurisdictional Defect Vitiating the Entire Court-Martial Proceedings

What we have said thus far has been on the assumption, *arguendo,* that substantial compliance with AW 70, *supra,* pp. 3-4 (or more precisely, the second paragraph of that Article), is a jurisdictional prerequisite to a valid trial by general court-martial. We submit, however, that, properly construed, compliance with AW 70 is not jurisdictional. Our contention is that, so long as the accused is accorded a fair trial and no fundamental, vitiating injustice has been committed either before or during the trial, a court-martial which is properly constituted has jurisdiction to try one who is subject to military law for offenses against military law, notwithstanding that there may have been procedural irregularities in the preparation, filing, and pre-trial investigation of the charges, and notwithstanding even the fact that the charges may never have been properly investigated prior to trial as directed by AW 70. Otherwise stated, we contend that where the jurisdictional conditions of a valid court-martial trial are otherwise satisfied, the jurisdiction of the court is not prevented from coming into existence by the bare fact that irregularities attended the

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pressed his contention that it was improper for Meyers to conduct the AW 70 investigation at the court-martial trial itself (see 76 F. Supp. at 974-975).

pre-trial handling of the charges; or even by the fact that no AW 70 investigation whatever may have been conducted.

We do not, of course, contend that the provisions of AW 70 may be ignored by the military authorities. Nor do we contend that AW 70 confers no rights on an accused. On the contrary, we readily concede that AW 70 confers definite rights on an accused—rights which he may insist upon before trial and at the trial, and concerning the deprivation of which he may complain, if necessary (see AW 121, 10 U.S.C., 1946 ed., 1593), "through channels, even to the War Department" (CM 323486, *Ruckman*, 72 B. R. 267, 273 (1947); quoted in part *infra*, at pp. 69-70). Nor do we deny that the properly constituted reviewing authorities, within the court-martial framework established by law, may set aside a conviction on direct review thereof, on the ground of erroneous and prejudicial failure to comply substantially with AW 70 (cf. Commentary on Article 32 of the proposed Uniform Code of Military Justice, *infra*, p. 76). See AW 37. All that we urge is that failure to comply, literally or substantially, with the provisions of AW 70, does not (absent a showing of actual prejudice) oust the court-martial of jurisdiction, so as to render the entire proceedings a nullity and subject the judgment to collateral attack on habeas corpus in a civil court. In short, we say, though AW 70 concededly confers rights on the accused, it confers "no rights the deprivation of which affects

the jurisdiction of the court to which charges against him are referred for trial." (CM 323486, *Ruckman, supra*, at 273, quoted in part *infra*, at pp. 69-70).

Before proceeding to discuss the legislative and administrative materials which support our view as to the non-jurisdictional nature of the provisions of AW 70 (*infra*, pp. 54-77), we wish to point out that there is nothing unreasonable or unjust about our interpretation of AW 70.

The pre-trial investigation, as will appear more fully (*infra*, pp. 56, 66-67) has, of course, a very definite purpose, and in fact a dual purpose. One is to preserve accused persons who happen to be innocent from the ordeal and ignominy of a general court-martial trial on charges which are in fact unfounded. The other is to save the Army from the time-consuming and expensive burden of conducting general court-martial trials of innocent persons, whose innocence could easily have been discovered by a thorough and impartial pre-trial investigation of the charges. But if for some reason in a given case the pre-trial investigation is not properly conducted or is even omitted altogether: *and if the accused receives a fair trial*, with prior notice of charges, the right of counsel, confrontation of witnesses, compulsory process for securing the attendance of witnesses in his favor, and all the other procedural safeguards of due process which the concept of a fair trial has traditionally implied; and if after such a fair trial he is found guilty of the

charges; and if, after careful review of the proceedings by the duly-constituted reviewing authorities, it is found that the findings are sustained by the evidence and that no prejudicial error has occurred; how can the accused have been prejudiced by the fact either that there was no pre-trial investigation at all or that the investigation was faultily conducted? The view that a conviction thus obtained can be held for naught on habeas corpus, possibly years later, when the court-martial and witnesses have dispersed, and memories faded, on the sole ground that the charges (of which the accused was found guilty beyond a reasonable doubt after a full and fair trial) were never properly investigated *prior to trial*, elevates purely preliminary procedures to a place beside considerations of substantial justice. If the pre-trial investigation is so indispensable that, without it, a court-martial is without jurisdiction to act, then even if the accused appears before the court and upon advice of counsel enters a formal plea of guilty to the charges, it is within his power thereafter—and, as we have said, possibly years thereafter, when re-trial is out of the question—to have his conviction and sentence annulled, in habeas corpus proceedings and thus escape the penal consequences of his crimes on the purely technical ground that the charges were not thoroughly investigated before trial. See remarks of Assistant Judge Advocate General Hoover, during the subcommittee hearings on H. R. 2575, 80th

Cong., 1st sess., Appendix B, *infra*, at p. 105. But the view that AW 70 is jurisdictional goes that far.

Such a conclusion is, we submit, not lightly to be reached. And it need not be reached—in fact, it cannot be reached—if due regard be paid to all the evidence, including that drawn from the legislative evolution of AW 70, which supports our view as to the proper meaning and interpretation of that Article. To a consideration of such evidence we now pass.

A. *The analogies of civilian criminal law emphasize that the non-decisive character of the AW 70 investigation precludes its construction as a condition precedent to court-martial jurisdiction.*

The pre-trial investigation of charges provided by AW 70 is unique in our law, as will be shown below. Nevertheless, certain analogies in civilian criminal law suggest themselves—specifically, the grand jury and the committing magistrate.

It is well established that a complete failure to comply with the requirement of the Fifth Amendment for indictment by grand jury renders the subsequent conviction invalid (*Ex parte Bain*, 121 U. S. 1) unless the accused expressly waives his right thus to be charged (Rule 7(b), F. R. Crim. P.). On the other hand, mere irregularities in the return of the indictment, such as the unlawful impaneling of the grand jury (*Harlan* v. *McGourin*, 218 U. S. 442, 451), disqualification of grand jurors

to sit (*Kaizo* v. *Henry*, 211 U. S. 146, 149; *Ex parte Harding*, 120 U. S. 782, 784), and the like (cf. *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C.A. 7), certiorari denied, 323 U. S. 790), do not affect the jurisdiction of the court which tries the accused. See also *Sunal* v. *Large*, 332 U. S. 174, 179, which reaffirms the principle that such defects and irregularities in the grand jury proceedings "do not cross the jurisdictional line". As to the proceedings before the commissioner or committing magistrate (F. R. Crim. P., Rule 5), it is well settled that even where there has been no preliminary hearing at all before a committing magistrate, the error does not go to the jurisdiction of the court which thereafter tries the accused. *Burall* v. *Johnston*, 146 F. 2d 230 (C.A. 9), certiorari denied, 325 U. S. 887; *Clarke* v. *Huff*, 119 F. 2d 204 (C.A. D.C.); *Garrison* v. *Johnston*, 104 F. 2d 128, 130 (C.A. 9), certiorari denied, 308 U. S. 553; cf. *Goldsby* v. *United States*, 160 U. S. 70, 73.

The functions of the AW 70 investigating officer are clearly less significant than those of the grand jury and probably less important than those of the committing magistrate. The investigating officer, unlike the grand jury, does not make the accusation; he merely investigates it after some one else has made it.[26] The crucial distinction lies in the

[26] Any person "subject to military law" may prefer charges; he must sign the charges and specifications and state "under oath either that he has personal knowledge of, or has investi-

decisive power of the grand jury—if it refuses to indict that is the end of the matter. In contrast, the AW 70 investigation can only result in a recommendation which is in no way binding upon the investigating officer's superiors.[27] Nor is the investigating officer essentially comparable to the committing magistrate. For, while the procedures to be followed by the investigating officer and the commissioner or committing magistrate are in some

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gated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief" (AW 70, 1st paragraph, *supra*, p. 3).

[27] Where the investigating officer has recommended trial by general court-martial, the appointing or convening authority has several options. He may decide that "all or some of the charges do not warrant further action because they are trivial, do not state offenses, are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged. If so, he may dismiss all or part of the charges" (MCM, 1949 ed., § 34*b*). Or he may "act under Article 104 [10 U.S.C., 1946 ed., 1576; informal disciplinary punishment for minor offenses] with reference to offenses for which such disposition is proper," in which event the "Specifications and charges thus disposed of * * * will be lined out and initialed" (MCM, 1928 ed., § 33). Or, he may decide that, despite the recommendation of the investigating officer, the charges should be tried by an inferior court-martial, *i.e.*, either a special or a summary court; and he is to be guided in making this decision by the precept that "With due regard to the policies of the Department of the Army and other superiors and subject to jurisdictional limitations, charges, if tried at all, should be tried by the lowest court that has power to adjudge an appropriate and adequate punishment" (MCM, 1928 ed., § 34). But in the event that he tentatively agrees with the investigating officer's recommendation of trial by general court-martial, the appointing or convening authority must then, before ordering such a trial, "refer [the charge or charges] to his staff judge advocate for consideration and advice" (AW 70, 3d paragraph, *supra*, p. 4; MCM, 1928 ed., § 35*b*).

respects the same,[28] the investigating officer does not have the power, which the committing magistrate has, of discharging the prisoner if he finds no "probable cause to believe that an offense has been committed and that the defendant has committed it" (Rule 5(c), F. R. Crim. P.). All that the investigating officer can do is to make a *recommendation* as to "what disposition of the case should be made in the interest of justice and discipline" (AW 70, 2d paragraph, *supra*, pp. 3-4). Like the AW 70 officer, the commissioner cannot refer serious charges to trial but can only hold the accused for action by the grand jury. See Rule 7, F. R. Crim. P.

It is clear from this comparison that the AW 70 investigator is closer to the committing magistrate than to the grand jury. The reasons which have persuaded the courts to hold that the lack of a hearing before a magistrate is not a jurisdictional defect apply to the AW 70 investigation as well. But application of the grand jury analogy leads to the same result; for the grand jury rule is that irregularities, as distinct from a complete failure to comply with the Fifth Amendment, will not subject a conviction to collateral attack as jurisdictionally defective. As we shall show (pp. 60-77,

[28] Both officers are required to inform the accused of the nature of the charges against him and to advise him that he is not required to make a statement but that any statement he may make may be used against him; and the accused is permitted to cross-examine witnesses against him before both

infra), even a complete failure to observe AW 70 would not constitute a jurisdictional defect; the investigator is not as essential as the grand jury, and the Article does not have the status of the grand jury requirement in the Fifth Amendment.

But if we assume, *arguendo*, that the facts discussed in Point I do in some manner depart from the requirements of the Article, there would be at most an irregularity and not a depriviation of either the substance of the Article or of any fundamental right. Todd's failure to interview Mrs. Kerry, his subsequent appointment as assistant trial judge advocate, and his participation to a slight extent and in an impartial manner in the investigation of the case before he was designated as AW 70 investigating officer, were but minor irregularities, if they were improper at all.[29] The grand jury cases certainly suggest that such deviations from customary practices are not jurisdictional in nature and do not warrant intervention by a habeas corpus court.

We believe that the non-decisive and preliminary character of the AW 70 pre-trial investigation clearly precludes adding non-compliance with AW

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officers and to introduce evidence in his own behalf (cf. Rule 5(b) and (c), F. R. Crim. P., with AW 70, 2d paragraph, *supra*, pp. 3-4, and MCM, 1928 ed., § 35*a*). And since February 1, 1949 (see footnote 2, *supra*, pp. 2-3), the investigating officer, like the committing magistrate, is required to advise the accused of his right to counsel in the proceedings before him (cf. Rule 5(b), F. R. Crim. P., with MCM, 1949 ed., § 35*a*).

[29] In Point I we have argued that they were not improper.

70 to the fundamental defects or errors which, when established in habeas corpus proceedings, render void the proceedings and judgment of a court-martial. Traditionally, it has been held that the proceedings of courts-martial are not subject to review in the civil courts, except for the purpose of ascertaining whether the military court was legally constituted, whether it had jurisdiction of the person and subject matter, and whether it had imposed a sentence authorized by law. *Carter* v. *McClaughry*, 183 U. S. 365, 381; *In re Yamashita*, 327 U. S. 1, 25. Admittedly, respondent's conviction is not defective in any of these respects. Even assuming that a showing of some fundamental procedural unfairness in a court-martial trial creates a jurisdictional issue reviewable in habeas corpus proceedings (cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 468), it is clear that a total failure to comply with AW 70 would not result in such basic unfairness. For AW 70 is not a constitutional requirement. It is enough to point out that AW 70 did not appear in the Articles of War until 1920, and still finds no equivalent in the Articles for the Government of the Navy.

Accordingly, there is no basis for concluding that compliance with AW 70 is a condition precedent to general court-martial jurisdiction, unless it appears that Congress intended AW 70 to constitute such a jurisdictional limitation. In the remainder

of this Point we shall show that the intent and understanding of Congress is to the contrary.

B. *That Congress never intended, and still does not suppose, compliance with AW 70 to be a condition precedent to a valid trial and conviction by general court-martial is conclusively indicated by the language and history of the Article.*—That Congress has never intended compliance with the provisions of AW 70 to be an absolute jurisdictional prerequisite to trial, the absence of which may be made the basis of a collateral attack on the conviction in the civil courts in habeas corpus proceedings perhaps years later, is convincingly indicated by a wealth of evidence based on the language and particularly the history of the Article.

1. To begin with, the language of AW 70 is not cast in jurisdictional terms. The pertinent part of the Article reads, "No charge *will be referred* [*i.e.*, by the appointing authority] to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made." It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charge against him shall have been made." See CM ETO 6694, *Wynock*, 17 B. R. (ETO) 163, 179, where the non-jurisdictional nature of the words employed in the Article was remarked by the Board of Review as partial support for its view that

compliance with the Article is not an absolute jurisdictional prerequisite to trial.

Nor is the language employed in the Article such that an intent to make compliance with its requirements a jurisdictional prerequisite to trial is implied. Compare, for example, with the words of AW 70—"No charge will be referred * * *"—the much more mandatory language of the Fifth Amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *"[30]

The very language of AW 70 thus strongly supports the view that it is directory rather than mandatory (see CM 323486, *Ruckman*, 72 B. R. 267, 273 (1947), *infra*, p. 70; CM ETO 4570, *Hawkins*, 13 B. R. (ETO) 57, 73-74 (1945), Appendix A, *infra*, p. 91; CM 229477, *Floyd*, 17 B. R. 149, 155 (1943), Appendix A, *infra*, p. 84; see also remarks of Undersecretary of War Royall and Assistant Judge Advocate General Hoover during the sub-

[30] And even this command of the Fifth Amendment, it is now well settled, creates merely a right or immunity in an accused which he may forego at his election; and was not intended to create a jurisdictional qualification of, or limitation upon, the power of a court to try the accused for such crimes. See Rule 7(b), Federal Rules of Criminal Procedure, promulgated by this Court, and Advisory Committee's notes thereto; *United States v. Gill*, 55 F. 2d 359, 400-403 (D. N.M.); cf. *Patton v. United States*, 281 U.S. 276, 287-298 (trial by jury). "For, if such had been the intent of the draftsmen of the Fifth Amendment, waiver of indictment would be ineffectual to remove the jurisdictional impediment thus created, since it would be impossible, of course, to confer jurisdiction of the cause by consent or stipulation.

committee hearings on H.R. 2575, 80th Cong., 1st sess., Appendix B, *infra*, at pp. 97-107), and is thus consistent with and corroborates our contention that AW 70 is in no proper sense jurisdictional.

2. The fact, as we have noted (*supra*, p. 59), that no provision comparable to AW 70 is or ever has been contained in the Articles for the Government of the Navy (34 U.S.C., 1946 ed., 1200) strongly suggests its non-jurisdictional nature. For, it would be surprising if Congress deemed one of the procedures provided for Army court-martial proceedings (and a merely pre-trial procedure at that) so vital to the proceedings as a whole that, without it, a court-martial would be utterly without power to try an accused, and yet never has seen fit to prescribe any such procedure for the Navy.

It is true that there is pending legislation which would extend the provisions of AW 70 to the Navy as well as the Army (§ 1, Art. 32, of H.R. 2498, 81st Cong., 1st sess., establishing a "Uniform Code of Military Justice"; see pp. 76-77, *infra*). But it is significant that this proposed legislation expressly provides that "failure to follow [the requirements relative to the pre-trial investigation] in any case shall not constitute jurisdictional error" (*id.*, Art. 32 (d)). The significance of this proposed amendment will be dealt with in more detail at pp. 76-77, *infra*, where it will be shown that the proposed amendment is designed to clarify existing law

rather than to change it, *i.e.*, to make explicit what has up to now been only read into the law by proper interpretation.

3. While compulsory process is available to secure the attendance of witnesses at the court-martial trial itself (AW 22, 10 U.S.C., 1946 ed., 1493),—process which is enforceable by prosecution in the civil courts (AW 23, 10 U.S.C., 1946 ed., 1494)—Congress has given the accused, with respect to witnesses at the pre-trial investigation, the opportunity merely "to cross-examine witnesses against him *if they are available*," and has directed the investigating officer to examine only "*available* witnesses requested by the accused" (AW 70, 2d paragraph, *supra*, pp. 3-4).[31] The contrast between these provisions emphasizes the much greater importance attached to testimony at the trial. Certainly it would be strange if Congress intended to make jurisdictional a mere preliminary to trial which it left unimplemented by any effective sanction to compel testimony.[32]

[31] "Ordinarily application for the attendance [at the pre-trial investigation] of any witness subject to military law will be made to such witness' immediate commanding officer. The decision of the officer exercising summary court-martial jurisdiction over the command to which the witness belongs as to availability is final. There is no provision for compelling the attendance of or for paying civilian witnesses" (MCM, 1928 ed., § 35*a*). See, as to the last sentence quoted, Dig. Op. JAG (1912-1940), § 428(4).

[32] English law during World War II provided for the compulsory attendance of civilian witnesses before American courts-martial, but not before American pre-trial investigating

4. Prior to February 1, 1949 (see footnote 2, *supra*, pp. 2-3), an accused was never entitled to counsel at the pre-trial investigation (Dig. Op. JAG (1912-1940), § 428 (3), par. 3; *Romero* v. *Squier*, 133 F. 2d 528, 532 (C.A. 9), certiorari denied, 318 U.S. 785), whereas, at least since the 1920 revision of the Articles of War, the accused before general and special courts-martial has always been entitled to counsel, either appointed by the court (AW 11, 10 U.S.C. 1482), or personally retained (AW 17, 10 U.S.C. 1488), or both (*ibid.*). This clear differentiation, up to only yesterday, between the pre-trial investigation and the trial itself in the matter of the right to counsel, further indicates that Congress has never deemed the pre-trial investigation of charges so vital and essential a part of the court-martial proceedings as a whole that, without it, the court-martial would be without jurisdiction.

Nor does the recent amendment of the law, guaranteeing the accused the right to counsel even at the pre-trial investigation (see footnote 2, *supra*, pp. 2-3), point the other way. As we have conceded (*supra*, p. 51), AW 70 confers definite, enforceable rights on the accused—rights which he may insist upon, through channels, to the Army Department itself if necessary. The recent amendment guaranteeing the accused the right of counsel at

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officers. See 1 Statutory Rules and Orders, 1942, pp. 849-850; cf. United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31.

the pre-trial investigation merely supplements those rights. For, by being able to claim counsel as of right at the pre-trial investigation, an innocent accused is better able to show, from the outset that the charges against him are without foundation, and thus be spared the opprobrium of a general court-martial trial; at the same time, the service is saved the expensive and time-consuming task of providing general court-martial trial of unfounded or minor charges. Consequently, we submit, the recent amendment guaranteeing to the accused the right to counsel at the pre-trial investigation is entirely consistent with the view that a court-martial has jurisdiction to try an accused, notwithstanding failure to conduct a pre-trial investigation.

5. The pre-trial investigation requirements of AW 70 seem to have their origin in paragraph 76 of the *Manual for Courts-Martial* (1917) pp. 40-41, as it read prior to the 1920 amendments of the Articles of War. Paragraph 76 provided in part that, "If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority he will, before so doing, either carefully investigate them himself or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to

him, orally or otherwise, the result of such investigation. The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him." It does not appear that the War Department policy embodied in this paragraph was ever regarded as going to the jurisdiction of a court-martial.

In March 1919, Major General Crowder, the Judge Advocate General, wrote to Secretary of War Baker recommending that paragraph 76 of the Manual be amended by general order "so as to require the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs either to personally conduct the investigation or else to depute it to an officer of experience, preferably not below the rank of captain, and to confront the accused with witnesses, * * * *". The purpose of this change, together with what is now the third paragraph of AW 70, was stated by General Crowder, "by laying down with greater particularity the duties and responsibilities of investigating officers and of staff judge advocates, to guard against any possibility of (a) hasty, ill-considered, or arbitrary action by any commanding officer, (b) ordering any person to trial without full and careful, as well as impartial, investigation of the

case, and until reasonable probability of his guilt has been shown; or (c) trivial cases going before general courts; and also to insure adequate preparation in all cases ordered to trial." War Department, *Military Justice During the War* (1919), p. 63.

The Congressional history of the 1920 amendments to the Articles of War throws no light upon whether what became the pre-trial investigation requirement of AW 70 was intended as a jurisdictional limitation. The brief debates were directed to more controversial matters. The report of the House Committee on Military Affairs, H. Rep. 940, 66th Cong., 2d Sess. (1920) pp. 2-3, merely states, in summarizing the salient features of the legislation, that "2. Speedy but thorough and impartial preliminary investigation will be had in all cases." Nowhere was there suggestion that a new jurisdictional limitation was being placed on courts-martial. Absent such a suggestion, there is no basis for assuming that by codifying the Army's pre-trial investigation *policy*, plus giving to the accused the right to confront the witnesses as recommended by the Judge Advocate General, Congress meant to create a new ground for setting aside the judgments of courts-martial in *habeas corpus* proceedings.

6. In 1937, Congress amended AW 70 so as to dispense with investigations of charges prior to

trial by summary and special courts-martial. Act of August 20, 1937, c. 716, § 2, 50 Stat. 724. The committee reports on the bill which became the amending Act (H. Rep. 1517 and S. Rep. 65, both 75th Cong., 1st sess., accompanying S. 1282) show that Congress intended to dispense with what amounted in practice to two trials of comparatively minor offenses.[33] But there is not the slightest suggestion in the reports, or in the letter of the Secretary of War (reproduced in the reports) recommending enactment of the proposed amendatory legislation, that elimination of any jurisdictional prerequisite to trials by inferior courts-martial was contemplated thereby. The conclusion is clear, therefore, that Congress, in enacting the 1937 amendment, did not suppose it was eliminating any such jurisdictional prerequisite. Hence, the 1937 Act and its history provide further persuasive proof that prior compliance with AW 70 is not, and never was intended to be, a vital element of the jurisdiction of a court-martial.

[33] Both reports state: "S. 1282 also proposes to amend article of war 70 for the purpose of simplifying court-martial procedure in cases referred to summary and special courts martial for trial. Present law requires that a preliminary investigation be made of all charges, however trivial, before referring the charges to a court martial for trial. The War Department reports that the great majority of cases involve only minor infractions of regulations or neglects of duty and are therefore tried by summary and special courts martial. The Department further points out that a preliminary investigation in these minor cases results, practically, in trying the cases twice, involving added and unnecessary expenditure of time by the investigating officers and witnesses."

7. Although the Judge Advocate General, in a case which arose in the early 1920s, shortly after the original enactment of AW 70, held that, *where there had been no pre-trial investigation at all*, the court-martial proceedings were void *ab initio*,[34] this decision (CM 161728, *Clark*) was expressly overruled in CM 229477, *Floyd*, 17 B. R. 149, 153-156 (1943), Appendix B, *infra*, pp. 82-87. Later holdings, representing the current view, are uniform to the effect that non-compliance with AW 70 is not a jurisdictional defect. CM 229477, *Floyd*, *supra*, 153-156; CM ETO 4570, *Hawkins*, 13 B.R. (ETO) 57, 71-75 (1945); CM ETO 6694, *Warnock*, 17 B.R. (ETO) 163, 179-180 (1945); CM 323486, *Ruckman*, 72 B.R. 267, 272-274 (1947).[35]

The Judge Advocate General's current interpretation of AW 70 is perhaps best reflected in the *Ruckman* holding of 1947, *supra*, where the Board of Review said:

> *The pre-trial investigation directed by Article of War 70 is for the benefit of the ap-*

[34] Dig. Op. JAG (1912-1940), § 428(1), par. 2: "A record of trial showed affirmatively that no investigation of the charges had been made prior to the trial. *Held:* The provisions of A.W. 70 with reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred to for trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of A.W. 70 and, in such a case, the court-martial proceedings are void *ab initio*. *C.M. 161728* (1924)."

[35] The cited holdings (except for the *Ruckman* holding, which, in pertinent part, follows in the text) are copied in pertinent part in Appendix A, *infra*, pp. 82-95.

pointing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial. And, a fortiori, the failure of the appointing or referring authority to comply with the provisions of said article does not constitute ground for annulling a sentence by general court-martial otherwise valid and enforceable. [Italics in the original]

These administrative interpretations of one of the Articles of War by the agency of review established by law within the Army are entitled to great weight, and the courts have in fact placed a very considerable reliance on opinions of the Judge Advocate General dealing with questions of military law. *Bowen* v. *Johnston*, 306 U. S. 19, 29-30; *Hironimus* v. *Durant*, 168 F. 2d 288, 289-291 (C.A. 4), certiorari denied, 335 U. S. 818; *Stout* v. *Hancock*, 146 F. 2d 741, 743-744 (C.A. 4), certiorari denied, 325 U. S. 850.

8. In 1946, the House Committee on Military Affairs, after a year's study of "court-martial procedure and the entire judicial system of the Army" (H. Rep. 2722, 79th Cong., 2d sess., p. 1), made a number of recommendations to the House, including the recommendation (*id.*, p. 3):

> That article of war 70 be amended to provide that failure to comply with its requirement for a thorough and impartial investigation before trial shall be a jurisdictional error.

Obviously, the committee did not consider compliance with AW 70 to be jurisdictional as it stands.

9. Perhaps the most persuasive evidence of all that compliance with AW 70 is not an essential jurisdictional condition of a valid court-martial trial is the fact that in 1948, Congress, being well aware, as we shall show, of the administrative construction placed on AW 70 by the Judge Advocate General's office (see pp. 69-70, *supra*), and despite the contrary recommendation of the House Committee on Military Affairs in 1946, reenacted the provisions of the Article without pertinent change. For it is a cardinal principle of statutory construction that an administrative interpretation placed on a provision of an act of Congress by the executive authority having the duty to administer the statute is deemed to be adopted by Congress when, with knowledge of the administrative construction, Congress subsequently

reenacts the provision without material alteration. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 99-100; *Koshland* v. *Helvering*, 298 U. S. 441, 445; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Poe* v. *Seaborn*, 282 U. S. 101, 116.

In 1948, as we have explained in footnote 2, *supra*, p. 2, Congress reenacted, *verbatim*,[38] the second paragraph of AW 70[38] (the paragraph involved in this case), merely renumbering it as AW 46b. The bill which eventually became the 1948 Act was S. 2655, 80th Cong., 1st sess. This bill (as explained in H. Rep. 2438, 80th Cong., 2d sess. [conference report on S. 2655], p. 51) incorporated the substance of the provisions of an earlier bill, H. R. 2575, 80th Cong., 1st sess. (which had passed the House on January 15, 1948 (94 Cong. Rec. 217)). This earlier bill was entitled "A bill to amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes." Extensive hearings were held on H. R. 2575 before Subcommittee No. 11, Legal, of the House Committee on Armed Services, and numerous witnesses testified, including Undersecretary of War (now Secretary of the Army) Royall, Major General Green, Judge Ad-

[38] Except that, as indicated in footnote 2, a new clause was inserted in the body of the paragraph, giving the accused the right to counsel at the pre-trial investigation.

vocate General of the Army, and Brigadier General Hoover, Assistant Judge Advocate General.

In Appendix B, *infra*, pp. 95-108, we have copied pertinent excerpts from the transcript of the hearings before this subcommittee. Examination of this transcript shows that one of the principal issues with which the subcommittee was concerned was the question of whether or not AW 70—or AW 46b, as it was numbered in the bill and as it was finally numbered in the Act—should be amended so as to make compliance therewith a jurisdictional prerequisite to a valid general court-martial trial. Both Mr. Royall and General Hoover carefully explained to the subcommittee that the War Department did not consider the requirement of pretrial investigation to be "mandatory" (and hence "jurisdictional"), but only "directory," together with the reasons for that view. General Hoover also explained that the Department had been for some time officially construing the requirement in that manner ("We thought that Congress intended that it should be directory and not mandatory. Possibly, we were wrong" (*infra*, p. 105)). Inasmuch as the bill under discussion made no pertinent change in the language of the provision requiring a pre-trial investigation, Mr. Royall and General Hoover also made it clear that the Department's interpretation would not be affected unless amendatory language were inserted making the requirement "mandatory," and hence

"jurisdictional". Mr. Elston, the chairman of the subcommittee, on several occasions expressed the opinion that it might be wise to amend the bill so as to make compliance with the investigation requirement jurisdictional and Mr. Johnson, a subcommittee member, even stated it as his opinion that the requirement was already "mandatory" as it stood. Furthermore, the subcommittee had before it (Subcommittee Hearings, *ibid.*, p. 2177) the 1946 recommendation of the House Committee on Military Affairs that failure to comply with AW 70 be made a jurisdictional error (*supra*, p. 71).

For present purposes the significant facts are that the subcommittee had its attention clearly and forcefully directed to the fact that the War Department had been officially construing the pre-trial investigation clause as being non-jurisdictional; that the question of whether the bill should be amended so as to make compliance with the requirement jurisdictional was thoroughly threshed out; and that the final decision was not to amend it.

In reporting out the bill, H.R. 2575, on which the hearings were had, the full Committee on Armed Services said in pertinent part (H. Rep. 1034, 80th Cong., 1st sess., p. 7):

> 4. Should the pre-trial investigation be made mandatory and should accused be furnished counsel at such investigation?

> This question presents a more difficult problem than is apparent. In our consideration of the subject of military justice we have been guided by the principle that the basic rights of an accused should be protected without encumbering the military system in such a maze of technicalities that it fails in its purpose. Upon this premise we have concluded that an investigation should precede every general courts-martial trial but that the investigation should be considered sufficient if it has substantially protected the rights of the accused. To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds.

While the above language is somewhat ambiguous, it is clear enough that the committee was answering "No" to its question, "Should the pretrial investigation be made mandatory * * *?" And since, throughout the hearings on the bill, the words "mandatory" and "jurisdictional" were used interchangeably and synonymously, it is plain that the committee meant that compliance with the pretrial investigation requirement, as contained in the bill reported out, was not intended to be "jurisdictional"—a result it achieved by merely failing to change the original language of AW 70. The inescapable conclusion, therefore, is that Congress knowingly acquiesced in the War Department's interpretation and thus, under the well settled

rule of statutory construction to which we have referred (*supra*, p. 71), ratified that interpretation.

10. On February 8, 1949, a bill (H. R. 2498, 81st Cong., 1st sess.) was introduced to establish a Uniform Code of Military Justice for the government of all three branches of the armed forces, superseding the Articles of War and Articles for the Government of the Navy. Article 32(a) and (b) of the proposed Code repeats the substance of the provisions of AW 70; Article 32(d) provides:

> The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error.

Under the heading "Commentary" (on this Article), as contained in the publication "*Uniform Code of Military Justice:* Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense," it is stated that "Subdivision (d) is added to prevent this Article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct an investigation required by this Article would be grounds for reversal by a reviewing authority under the Code and an intentional failure to do so would be an offense under Article 98."

It is evident, of course, that Article 32(d) of this proposed legislation is designed to eliminate all possible doubt as to whether compliance with the pre-trial investigation requirement is jurisdictional by providing expressly that it is not. It may be argued that the proposed amendment indicates an intent to change existing law in this respect. Plainly, however, such an argument would ignore the entire legislative history of the pre-trial investigation requirement, as we have reviewed it (*supra*, pp. 66-76), particularly the history immediately preceding the reenactment, without material change, of the content of AW 70 in the 1948 revision (*supra*, pp. 71-76). The contrary conclusion, we submit, is inescapable —that the object of the proposed amendment is merely to clarify and restate existing law,—to make explicit what has heretofore been the result of correct administrative interpretation.

C. *The only appellate decision on the jurisdictional issue, aside from the decision under review, supports the view that compliance with AW 70 is not jurisdictional.*—Only one appellate decision has been found, aside from the decision under review, which has passed on the question of whether compliance with AW 70 conditions the jurisdiction of a court-martial, and the ruling was that compliance is not jurisdictional. *Waite* v. *Overlade*, 164 F. 2d 722 (C.A. 7), certiorari denied, 334 U. S. 812. The holding of that case would seem to be

contained in the following language of the opinion (164 F. 2d, at 723-724):

> On appeal appellant asserts that the court-martial was without jurisdiction to try him because proper procedures had not been followed with respect to pre-trial investigation [and for other reasons].
>
> * * * * *
>
> The record on this appeal establishes that appellant was, at the time of the offense charged, subject to military law and to trial for that offense by a general court-martial. Hence, if properly constituted, there is no question as to the jurisdiction of the court of his person and of the offense.[37]

Several decisions of Courts of Appeals have expressly assumed, *arguendo,* that substantial compliance with AW 70 is jurisdictional (*Becker* v. *Webster,* 171 F. 2d 762, 764 (C.A. 2), (see footnote 23, *supra,* p. 47); *Henry* v. *Hodges,* 171 F. 2d 401, 401-402 (C.A. 2) (see pp. 47-49, *supra*); *Reilly* v. *Pescor,* 156 F. 2d 632, 634-635 (C.A. 8), certiorari denied, 329 U. S. 790).[38] *Benjamin* v.

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[37] Later in the opinion, however, the court said (164 F. 2d, at 724): "If there was any relaxation of pretrial investigation requirements not waived by appellant (and we are not convinced that there was), it certainly was not of a nature seriously to impair any of his fundamental constitutional rights."

[38] *DeWarv. Hunter,* 170 F. 2d 993, 995-997 (C.A. 10), also assumed, *arguendo* (though not expressly), that substantial compliance is jurisdictional.

Hunter, 169 F. 2d 512, 514 (C.A. 10) states in a *dictum* that "Taking into consideration the plain language and the intended purpose of the Article [AW 70], it is clear that a preliminary investigation in substantial compliance with its requirement is essential to a valid conviction and sentence by a court-martial." [39] Judge Murrah, however, who was on the panel which decided the *Benjamin* case, subsequently emphasized, in a concurring opinion in *DeWar* v. *Hunter*, 170 F. 2d 993, 997, the *obiter* nature of the above-quoted statement in the *Benjamin* case, and cautioned "those who would rely upon the isolated statement" not to take "encouragement" from it. "None of the cases cited, or which I have been able to find," Judge Murrah said, "hold or infer that failure to comply with Article 70 ousts the court-martial of jurisdiction to try one charged with an offense under Military Law." [40]

Only one district court decision has been discovered which has squarely passed on the jurisdictional question here presented. That decision, *Henry* v. *Hodges*, 76 F. Supp. 968, 970-974 (S.D.

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[39] That this statement is *dictum* is evident from consideration of what the case held, as to which, see pp. 39-40, *supra*.

[40] *Thompson* v. *Sanford*, 163 F. 2d 830 (C.A. 5), certiorari denied, 333 U.S. 856, was an affirmance, without opinion, of a decision discharging the writ in a habeas corpus proceeding in which the relator relied on an alleged deprivation of rights during the pre-trial investigation (see our brief in opposition to certiorari, No. 163 Misc., O.T. 1947). It is not possible to

N.Y.), reversed on another ground,[41] 171 F. 2d 401 (C.A. 2), held that failure to comply substantially with AW 70 is a jurisdictional error, and hence is adverse to our contention here. In view, however, of all the evidence, reviewed *supra,* at pp. 54-77, which points almost conclusively to the conclusion that compliance with AW 70 is not jurisdictional, —most of which evidence, it should be noted, the district court in the *Henry* case did not even refer to—the decision is unsupportable. Another district court decision, *Anthony* v. *Hunter* 71 F. Supp. 823 (D. Kans.), also appears to hold that failure to comply with AW 70 is a jurisdictional defect (see pp. 830-831),[42] though the actual decision, holding the court-martial sentence void, was manifestly influenced to a very great extent by a finding of fundamental and vitiating unfairness at the trial itself (see pp. 824-827, 831), which obviously is quite another matter. A third district court case, *Hicks* v. *Hiatt,* 64 F. Supp. 238 (M.D. Pa.), states that the provisions of AW 70 "are mandatory" (p. 242), but this statement is clearly *dictum;* for one thing, the whole opinion is *dictum,* since it was

know, therefore, whether the Fifth Circuit's ruling was that compliance with AW 70 is not jurisdictional or merely that there was substantial compliance in that case.

[41] I.e., on the ground that there was substantial compliance with AW 70 in that case (see pp. 47-48, *supra*).

[42] In *Arnold* v. *Cozart,* 75 F. Supp. 47 (N.D. Texas), where a petition for a writ of habeas corpus was filed by a co-defendant of Anthony (of *Anthony* v. *Hunter, supra*) arising out of the same circumstances, the jurisdiction of the court-martial was upheld.

filed after the cause had become moot (see p. 250, note 28); furthermore, apart from the mootness feature, what actually was held was that the court-martial sentence was void because of a complete denial of due process of law by reason of the "totality of errors" pervading the entire proceedings, including the pre-trial, trial, and review stages.

CONCLUSION

For the reasons stated, the court below erred both in holding that AW 70 was not obeyed in this case and also in holding that compliance with the provisions of that Article is an absolute jurisdictional prerequisite to a valid trial by general court-martial. The decision cannot be sustained if erroneous in either respect. It is therefore respectfully submitted that the judgment below should be reversed.

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MARCH 1949.

CM 229477, *Floyd*, 17 B.R. 149, 153-156 (1943):

* * * * *

6. There is nothing in the record of trial and accompanying papers to show that the requirements of Article of War 70 for a pre-trial investigation of the charges were complied with, nor does it appear that the appointing authority referred the charges to his staff judge advocate for consideration and advice prior to reference for trial. Furthermore, before acting upon the proceedings, the reviewing authority, so far as appears, did not refer the record of trial to a staff judge advocate as required by Article of War 46. Ordinarily, a presumption of regularity in the performance of their duties by the officers responsible for the fulfillment of these requirements might be indulged (par. 112*a*, M.C.M.). The circumstances of this case, however, suggest that the requirements were not in fact complied with.

The requirements for references of charges and records of trial to staff judge advocates have heretofore been held to be directory only and to have no effect upon the legality of the proceedings (CM 215720, *Pool;* CM 215721, *Klobucher;* CM 224823, *Grenzebach*). However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraph 76*a*, Manual for Courts-Martial, 1921, relating to pre-trial investigation, were jurisdictional, and that failure to comply with them rendered the proceedings of the court void *ab initio* (CM 161728, *Clark*). Subsequent holdings of the Board of Review have reached

the same result (CM 182225, *Keller;* CM 183183, *Claybaugh*). In neither of these latter cases was the holding based upon lack of jurisdiction; rather, the theory appears to have been that failure to comply with Article of War 70 was *per se* an error injuriously affecting the substantial rights of accused. Although these cases have not been expressly overruled, opinions on analogous points indicate that the first three paragraphs of Article of War 70 have come to be regarded as directory only in all respects and that failure to comply therewith is not fatal error. The following cases represent examples of this view: Sec. 376 (3), Dig. Op. J.A.G., 1912-1940 (failure to swear witness not prejudicial error where facts admitted or otherwise proved); CM 172002, *Nickerson* (failure to sign or swear to charges); CM 201563, *Davis* (report of investigation by telephone instead of in writing); CM 202511, *Godfrey* (no reinvestigation after staff judge advocate had amended charges by changing the article of war and the name of the owner of stolen property); CM 206697, *Brown* (reference of charges to accuser for investigation). The *Nickerson* case contains the following apt language:

> "The provisions of A.W. 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to

would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, *Nickerson*).

The reasoning in the *Nickerson* case applies with equal logic to the present case.

The foregoing cases, together with those holding that failure to make the required references to staff judge advocates is not fatal error, justify the conclusion that the investigation required by Article of War 70 is not mandatory, and that its omission does not constitute fatal error. This conclusion coincides with the apparent Congressional intention in enacting the statute, which was to prevent "unnecessary and unjust trials" based "on flimsy evidence without a prima facie case" (Hearings before the Senate Committee on Military Affairs, on S.B. 5320, 65th Cong., 3rd Sess., p. 108; Hearings before the Subcommittee, Senate Committee on Military Affairs, on S.B. 64, 66th Cong., 1st Sess., pp. 101, 1390; Proceedings, Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919, p. 5). The requirements are wholly procedural and do not affect the processes of courts-martial in their determinations of guilt or innocence. Although the language of a statute is mandatory it may be regarded as directory if the legislative purpose can best be carried out by such a construction (59 C.J. 1072). Moreover, the Supreme Court has held that the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution, which are mandatory in form and some of which involve procedural matters, are not limitations upon the juris-

diction of the trial court and may be waived (see, for example, *Trono* v. *United States*, 199 U. S. 521; *Diaz* v. *United States*, 223 U. S. 442; *Segourola* v. *United States*, 275 U. S. 106; *Johnson* v. *Zerbst*, 304 U. S. 458). In *United States* v. *Gill*, 55 Fed. (2d) 399, a United States district court has expressed the view that indictment by a grand jury (a procedure basically similar to investigation of charges) may be waived. In reaching this conclusion the court applied the reasoning of the Supreme Court in *Patton* v. *United States*, 281 U. S. 276, a case pertaining to waiver of trial by jury in criminal cases, guaranteed by section 2, Article III of the Constitution. In that case the Supreme Court said, among other things:

> "The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege', albeit 'the most transcendent privilege which any subject can enjoy.'

* * * * *

"In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.

* * * * *

"Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement" (*Patton* v. *United States*, 281 U. S. 276, 296-298).

For the foregoing reasons it is the opinion of the Board of Review that the provisions of Article of War 70 requiring investigation of the charges before trial are not jurisdictional, and that under the circumstances of the present case failure to comply with them did not injuriously affect the substantial rights of accused. To quote from a penetrating review by the staff judge advocate in the Brown case (CM 206697):

"If * * * a thorough and impartial investigation is not had, [and] nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is *injuria sine damno*, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted, and sentenced; and, if he has had a

> fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case therefore falls within the exact language of A.W. 37. * * * It was no part of the purpose of the authors of A.W. 70 to prevent the trial, conviction, and punishment of a guilty man."

In so far as the Clark, Keller and Claybaugh cases are in conflict with this holding, they should no longer be followed.

It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the "record of trial" and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground.

* * * * *

CM ETO 4570, *Hawkins*, 13 B.R. (ETO) 57, 71-75 (1945):

* * * * *

7. The papers accompanying the record of trial show that the charge laid under the 75th Article of War was investigated as required by AW 70 and par. 35, MCM, 1928. Thereafter the staff judge advocate cancelled the charge thus investigated and submitted to the Commanding General of the 35th Infantry Division the Charge under Articles of War 58-28 upon which accused was arraigned and tried. The charge sheet was not re-signed and was not re-verified by the accuser and no further investigation was made of the new charge. It has

been established that the investigation of the charge is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional (CM 229477, *Floyd*, 17 B.R. 149). It has also been determined that:

> "The provision of AW 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution, and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, *Nickerson*).

The situation which arose in the present case was strikingly foreshadowed by the facts involved in CM ETO 106, *Orbon*, which received painstaking consideration by the Board of Review (sitting in the European Theater of Operation). The Board's discussion of this issue is comprehensive and cogent. The following quotation therefrom is decisive in the instant case:

> "While the charges form the basis of the investigation it is the *transaction* or *event* which gave rise to the charges which is the true subject of investigation. This conclusion is supported by: (a) the fact that 'no appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge

advocate *based on all of the information relating to the case.*' (Italics supplied) (MCM, sec. 34) and (b) 'The investigation will include inquiries as to the truth of the *matter* set forth in said charges, form of charges, and *what disposition of the case should be made in the interest of justice and discipline.*' (Italics supplied) (AW 70). The italic words and clauses above quoted indicate clearly that the investigation envelops the entire situation. It may be that the charges are inappropriate to cover the offense or offenses revealed by the investigation. Hence, the convening authority is empowered to amend and adjust and should amend and adjust the charges to meet the facts (MCM, sec. 34) before referring the charges for trial. The only limitation on his authority in this respect is that the 'redraft does not include any substantial change *or include* any person, offense, or *matter not fairly included in the charges as received.*' (Italics supplied) (MCM, sec. 34). This limitation prevents the insertion of a new charge which is alien to the situation revealed by the facts disclosed, but it does not prevent the convening authority from redrafting or re-stating the charges so as to make them allege an offense or offenses supported by the facts discovered and shown by the report of investigation. An opposite conclusion leads to the absurd situation of requiring a new investigation which would yield the exact state of facts as the first investigation. It would be a futile effort, which would

delay the trial and not protect any rights of the accused. This construction of AW 70 is supported in spirit by C.M. 179142 (1928), C.M. 182078 (1928), and JAG, 220.26, Aug. 30, 1932, digested in Dig. Ops. JAG. 1912-40, sec. 428 (1), pg. 292. It is, therefore, the opinion of the Board of Review that there was no violation of AW 70, in the instant case, because a new and additional investigation was not made on Charge II and its Specification, and that the court acquired jurisdiction to try the same.

However, the accused was compelled to go to trial upon a Charge and Specification which were not supported by the oath of the accuser. It has been held that the quoted provision of AW 70, requiring that the charges be supported by the oath of the accuser is *procedural*, and not *jurisdictional*, is for the benefit of the accused and may be waived by accused either explicitly or by failure to object to the irregularity (CM 197674 (1932), sec. 1267, Supp. VIII. Dig. Ops. JAG, 1912-30; C.M. 210612 (1939), *Maddox*; C.M. 220625 (1942), *Gentry*) (Cf: sec. 1267, Dig. Ops. JAG. 1912-30). In the case timely and proper objection was made. There was no waiver, either expressed or implied, of the irregularity.

The supporting of charges by the oath of the accuser is not universally required. MCM, 31, particularly provides that the charges need not be sworn to if the accuser believes in the innocence of the accused.. In criminal prosecutions, in the civil courts the absence of a

verification to an information where one is required by statute, is ground for quashing the information, but it does not render the information void or deprive the court of jurisdiction, and, after committing error in overruling a motion to quash on this ground, the court still holds jurisdiction. (31 C.J., sec. 166, pg. 648). The record of trial in this case fails to show how accused was prejudiced in any respect by the court's ruling which compelled him to stand trial on Charge II and Specification although it was not verified. Nothing appears in the record of trial that accused's rights were injuriously affected by this irregularity in pleading. He was neither surprised nor misled as to the charges against him. The accused made no attempt to controvert the prosecution's evidence which support the conviction of violation of AW 63 (Charge II and Specification). He denied all knowledge of his conduct because of being intoxicated. Under such circumstances the verification of Charge II and Specification would have added nothing to his defense, nor does its absence injure him."

The *Nickerson* and *Floyd* cases, above cited, definitely determine that the requirements of the first three paragraphs of the 70th Article of War are directory and not mandatory and the failure to observe all or any of them neither deprives the court of jurisdiction nor do such defects and imperfections in the pre-trial procedure necessarily prejudice the substantial rights of an accused.

In the instant case the accused made no objection to the charge on the ground that it was not sworn to, but the absence of any objection may be explained by the fact that the irregularity does not affirmatively appear upon the face of the charge sheet. It only so appears when examination is made of the papers and documents accompanying the record of trial, including the staff judge advocate's report and recommendation. The Board of Review therefore prefers not to place its conclusion upon the narrow ground that accused failed to make proper objection at trial. It will be assumed that had he known of the irregularity he would have objected.

Had such objection been made and sustained what would it have yielded him? Such objection is in the nature of a plea in abatement, which upon being sustained only delays the trial; it does not terminate it. If the objection had been upheld then an application for a continuance would have been in order. It is obvious that a denial of the application would not have injured accused's substantial rights, (MCM, 1928, par. 66, pp. 51-52). The substituted Charge and Specification, although unsworn fully informed accused of the nature of the charge against him. The addition of an oath to the charge would not have changed or altered the issues in any degree. The trial proceedings based on sworn charges would not differ from those based on the unsworn charges. The trial would have been as fair and just on one as on the other. All the accused would have suffered was *injuria sine damno*, a technical wrong which could have

done him no harm (CM 206697, *Brown*). The purpose of the requirement that the charges be sworn to by the accuser was to protect an accused from frivolous or malicious prosecution (CM 172002, *Nickerson, supra*). There was no thwarting of such purpose in the practice followed herein. The irregularity involved in the prosecution's arraigning and trying accused upon an unsworn charge, although not condoned, was a harmless error, within the provisions of the 37th Article of War.

The following comment of the Board of Review in the *Floyd* case is adopted:

> "It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground" (Ibid., 17 BR 149, 156).

The Board of Review is clearly of the opinion that the practice followed in the instant case affords no reason for disturbing the findings of the Court that accused was guilty of desertion.

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CM ETO 6694, *Warnock*, 17 B. R. (ETO) 163, 179-180 (1945):

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The foregoing holdings support the conclusion that violations of the provisions of the 70th Article of War do not affect the jurisdiction of the court, and except under extraordinary or unusual circumstances do not constitute error prejudicial to

the substantial rights of accused. This conception of the 70th Article of War views the requirements thereof as administrative in nature, and of immediate concern to the authority holding general court-martial jurisdiction. Many of the provisions are intended for his benefit in order to enable him to act fairly and intelligently upon the charges. Other requirements of the Article are for the benefit of the accused and are intended to protect him against unwarranted or malicious prosecution of unfounded charges. It is the duty and function of the authority referring the charges for trial to insist that there be reasonable compliance in good faith with this Article of War in preparing and investigating the charges. Usually the requirements of the 70th Article of War do not concern the court after reference of the charges to it for trial. The action of the appointing and referring authority is binding upon the court in respect to such matters (CM ETO 4570, *Hawkins*, supra; CM ETO 5155, *Carroll* and *D'Elia*, supra).

Although compliance with the requirements of the 70th Article of War under the foregoing interpretation of the Article is a matter of primary responsibility of the officer empowered to appoint general courts-martial, the Board of Review believes that it may with propriety express its apprehension and concern over the practice by staff judge advocates of inserting new charges on a charge sheet without affording opportunity to the accuser of either confirming or disaffirming his signature and oath to the original charge sheet. While the practice was legally permissible under the circumstances of the instant case, Captain Raley's reaction when his attention was attracted

to the alterations of and additions to the charge sheet is fairly indicative of the attitude of most men when written matter has been placed over their signatures without their knowledge and consent. In the Army, where an officer's signature is given the greatest credence and faith, it is particularly desirable that an accuser be fully informed as to substantial changes in the charge which he has supported by his signature and oath, and be afforded the opportunity of withdrawing his name as accuser or of confirming the alterations and changes made in the charges.

The following comment of the Board of Review in the *Floyd* case, supra, is quoted with approval:

> "It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50½ relates entirely to the 'record of trial' and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based on this ground" (17 B.R. 149, 156).

APPENDIX B

SUBCOMMITTEE HEARINGS ON H.R. 2575, TO AMEND THE ARTICLES OF WAR TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE, TO PROVIDE FOR MORE EFFECTIVE APPELLATE REVIEW, TO INSURE THE EQUALIZATION OF SENTENCES, AND FOR OTHER PURPOSES

House of Representatives,
Committee on Armed Services,
Subcommittee No. 11, Legal,
Monday, April 14, 1947.

* * * * *

[Pp. 1924-1925.]

Mr. Elston [Chairman of the Subcommittee]. One of the very serious objections to the present system, or at least as it was administered during the war, was that there was not a sufficient pretrial investigation of the facts. What have you to say about that?

Mr Royall [Undersecretary of War; now Secretary of the Army]. Well, sir, I think that was greatly exaggerated. As a matter of fact, the American Bar Association Committee, in studying numerous cases, I don't think found a single instance where they thought an innocent man had been convicted. Now, I don't mean there weren't any. You couldn't have thousands upon thousands of cases without making a mistake. Nobody could do that, but there really wasn't any difficulty along that score, an [y] appreciable difficulty. Certainly the record was much better than any civil court that I ever knew of. So whether or not there was an adequate preliminary investigation I don't think played any substantial part in the final result.

However, our bill does not make it a jurisdictional factor, but it does contemplate a thorough investigation. In the States in which I have practiced law, preliminary investigations are never a jurisdictional requirement. I know they are not in the Federal courts, and not in any State where I have tried a criminal case, and I have tried criminal cases in several States. We would be departing radically from accepted judicial practice, generally throughout the United States, if we made that a juris-

dictional requirement. That is really the difference between the Durham bill and this, as I understand.

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Mr. Elston. There was some complaint, also, that because there was an inadequate pre-trial investigation, evidence got away.

Mr. Royall. Yes, sir.

Mr. Elston. Armies were on the move and witnesses were present today and gone tomorrow, as a consequence of which there was an incomplete preliminary investigation and much evidence that might have been helpful to an accused was lost. So don't you think, under such circumstances, there should be some mandatory provision with respect to an adequate preliminary investigation?

Mr. Royall. I would not make it mandatory, for the reasons I have stated.

Mr. Norblad. You would not, sir?

Mr. Royall. Would not make it mandatory. That is also a close question. I don't think you can be too dogmatic either way on that. I think it is sufficient as we have it because it would be done in every case, unless there were some very unusual circumstances. In practice it would be done, under our provisions.

Mr. Elston. What would be the reason why it couldn't be done?

Mr. Royall. Well, this is another reason: The more legal technicalities we inject into the court-martial system—jurisdictional requirements, one of the principal things lawyers who are technical like to bring up on appeal—

the more we have of those, the more we are going to hurt the system.

The reason the court martial has done better in my opinion than any civil system that I know of, in reaching just results, is because we have kept those legal technicalities to a minimum.

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I would shy away from jurisdictional requirements. When you get a jurisdictional requirement which goes contrary to the normal civil court procedure, I am sort of inclined against it.

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[Pp. 2058-2061.]

General Hoover [Assistant Judge Advocate General of the Army]. * * * The provisions with respect to charges and pre-trial investigations as incorporated in the proposed article 46 do not differ from those in the present article 70 except that the punitive provisions now existing are retained in article 70. I may say that the War Department feels that the pretrial investigation as at present required by article 70, and which is to be carried on by the new article 46, has been of inestimable value in the administration of military justice. To make a long story short, it eliminates most of the errors possible in preferring and disposing of charges. It prevents a great many trials and results in trials by inferior courts in a great many cases where the men might otherwise be tried by general courts-martial.

* * * * *

Mr. Elston. General, would you consider it jurisdictional error if this section were not complied with?

General Hoover. No, sir; if it were made jurisdictional error, we would inject into our trial procedure a difficult and highly technical situation. We think that the guilt or innocence of the man ought to be determined at the trial. If we inquire into what was done before the trial from the standpoint of the commission of error, we are just asking for trouble. I should like to say, in that connection, that in my experience I have not seen more than a half dozen cases in which there has not been a reported investigation or an investigation in fact. Some of the investigations are done better than others and some of them aren't done well, we must concede that. But the object of the investigation is normally fully served before the man goes to trial. If he goes to trial in a case in which a better investigation might have prevented trial, an [y] possible injustice can be prevented at the trial and by action after the trial.

Mr. Elston. General, suppose you have the case where a commanding officer does not comply with this section. He doesn't permit the accused to examine witnesses at the preliminary hearing and arbitrarily files a charge and presents it to a general court martial for hearing. What if anything can be done about it, if it isn't a jurisdictional error to so act?

General Hoover. If it appeared in the Office of the Judge Advocate General that the man had been deprived of any substantial

right, such as the presentation of testimony in his own behalf, or something of that kind, it would be possible for us to say that the error injuriously affected the rights of the accused and that the sentence should therefore be vacated. The case of real injury would be rare. Ordinarily guilt or innocence is and should be determined at the trial and not by what occurred prior to the trial.

Mr. Elston. A great many things can be developed at a preliminary investigation, if the accused is given the means and the opportunity to present and examine witnesses.

General Hoover. Yes, sir.

Mr. Elston. And insist upon the presentation of certain facts.

General Hoover. Yes, sir.

Mr. Elston. If he is deprived of that opportunity, I don't know why it shouldn't be jurisdictional error.

General Hoover. We would be considering as jurisdictional error something that happened beforehand and that really had no bearing on the man's guilt or innocence. The accused has a complete opportunity to meet the issue of guilt or innocence at the time of the trial.

Mr. Elston. If you don't make it jurisdictional error, then this section is meaningless. It is not mandatory.

General Hoover. It is not mandatory, but I think it is far from meaningless, Mr. Elston, because it has been most effectively used in the Army.

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Mr. Elston. But it is purely directory.

General Hoover. It is directory as it stands, but as a directory provision I think it has been extremely useful in advancing justice, in expediting trials, and in preventing unnecessary trials.

Mr. Elston. I don't doubt that for a moment, but I can see where an accused person would lose some of his very substantial rights if he were not given the opportunity to appear, to examine witnesses, to insist on the presentation of certain facts, and to be fully protected, the same as he would be at any preliminary hearing in a court of law. If you simply make it permissive it may be that you haven't gone far enough.

General Hoover. Well, if the failure to conduct the investigation in the manner required—

Mr. Elston. How are you going to determine whether or not substantial justice had been done? Suppose he were insisting, for example, that certain testimony if presented would have absolved him and nothing was done about it. How is a reviewing court going to know what would have happened had that evidence been presented?

General Hoover. We would have to go to the report of investigation or to anything that he might present in connection with it at the trial. We have had these attacks made in the course of the trial by the accused persons upon the investigations. I think the facts are usually developed. And I think we must come back, in defending the directory nature of it,

to the fact that guilt or innocence is to be determined at the trial and that the accused is there afforded every opportunity to meet the issues.

Mr. Brooks. General, what would you do if you had a commanding officer who just customarily ignored the requirements of preliminary examination?

General Hoover. I have in my experience never known one to do so. I think he would be brought to account very quickly if that were discovered.

Mr. Brooks. Well, does the Judge Advocate General's Department have authority over an officer of that character?

General Hoover. We would have no direct authority. We would have to bring the matter to the attention of the responsible officer in command channels.

Mr. Brooks. You would consider it a violation of the rules and regulations of the Army?

General Hoover. Yes, sir; we would bring it to the attention of the general commanding.

Mr. Brooks. Now, in civilian life, of course, if a man in the Federal court is indicted he is not entitled to any preliminary examination, but if it is on a bill of information he is entitled to appear and examine witnesses, as I understand the law. You would consider every complaint in the Army an indictment, so to speak, for that purpose?

General Hoover. Yes, sir; every set of charges. Of course, it is contemplated that the man will be afforded an opportunity to cross-examine the witnesses, and to call any witnesses—

Mr. Brooks. That is on trial, but not in a preliminary examination.

General Hoover. On both occasions. I should like to correct any impression that the present article of war seventy is not followed generally. It is followed generally.

Mr. Elston. Well, General, if it is followed generally, then I don't see what you have to worry about, if it is made jurisdictional error not to follow it.

General Hoover. We don't consider it a jurisdictional matter. We look at the substance, rather than the form, that is all. We should gain nothing of substance if the law were treated as mandatory.

Mr. Johnson. The administration is what does that, not the law. The law is absolutely mandatory, I think, the way it reads. The word "shall" means exactly that. So the way you handle it, by administrative decree, you declare that to be only a directory provision of the article.

General Hoover. The present interpretation of the article making it directory only is based on an opinion of the Board of Review, with which I personally had something to do. It is based on the practice in the Federal courts. It follows the decisions of the Federal judiciary. And I think it is sound from the legal standpoint. I think we would consider it as error, all right, if there were a failure to comply with the article, but there is a difference between treating it as error and treating it as jurisdictional error.

Mr. Brooks. That is right.

General Hoover. And that is what we are trying to avoid, and what we tried to avoid in handing down that opinion.

Mr. Johnson of California. Well, is it your opinion, based on your experience, that the subsequent trial corrects the violation of this provision?

General Hoover. Yes, in the normal case.

Mr. Johnson of California. Because he has a chance to present his entire case.

General Hoover. Yes. If he had anything that he wants to present, he can present it at the trial. If he is prevented from presenting it at the trial, then it is error on the trial, which we can certainly consider.

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[Pp. 2064-2065.]

Mr. Johnson of California. That is what you do, but the way I look at it you have taken this law, which I think is mandatory in its phrasing, and have gotten around it in the way you administer it and the way you have handled it.

Now, if you had a clause like that in there, to sustain by legal phrasing and by an actual statute what you do, I think it would be much better.

General Hoover. Well, if we make it mandatory, Mr. Johnson, then we get away from the substantial justice principle.

Mr. Johnson of California. No. What I am asking you is this: If you had a clause similar

to the provisions in our Constitution, that the reviewing board, or in our State the appellate court, after reviewing the entire record and even despite the alleged technical violations of the defendant's right they can still sustain the trial court if they find substantial justice has been afforded him, it might be advisable. That is what they do out there to handle the situation.

General Hoover. That is what we do. Substantiality of justice is the argument in support of our interpretation of this clause.

Mr. Johnson. Yes, but there is no statutory authority for you to do that, as I see it. To overcome this specific provision of the article.

General Hoover. We thought that Congress intended that it should be directory and not mandatory. Possibly we were wrong.

Mr. Johnson. If we made it jurisdictional error not to comply with the provisions of the statute it would be mandatory, wouldn't it?

General Hoover. Then it would be mandatory, and if the investigation were not made, at least in substantial conformity with the requirements, we would have to set aside the sentence although the man came in and pleaded guilty. That illustrates the point. It is an extreme case, of course.

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[P. 2146.]

Mr. Royall. * * * On the question of preliminary investigation—I am not taking these questions up quite in the order I gave them—

we follow the American Bar Association report exactly. We have provision for requiring a preliminary investigation. The only issue is whether it should be made jurisdictional. The feeling we have was partially stated by me before. First, we believe it more analogous to the civil court procedure not to make it jurisdictional. Then we feel that if a man is convicted on evidence produced in court and his guilt is proven, it is really nothing more than a technicality to go back and say, "He is guilty, but the case wasn't investigated enough in the first instance." The investigation itself cannot affect the evidence produced at the trial. The accused still has a chance to put up his defense, and under our suggestions made here he has an equal power with the prosecution to provide the evidence for his defense.

We would like to get away from technicalities. The one advantage of the court-martial system over the civil system which stands out most, is the lack of purely technical legal questions that can be raised, and that is the reason I feel—and the American Bar Association committee at least implied—that the court-martial system—even as it is—gives substantial justice—does better than civil courts. This is all I want to say about that. I think it worth the committee's reexamination and close examination to see if we can't leave preliminary examination as a requirement, but not make it a technical ground on appeal.

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[Pp. 2152-2153.]

Mr. Kilday. Now, on the question of a mandatory preliminary investigation, I take it there is quite a distinction, of course, between a mandatory investigation and a mandatory preliminary hearing, for instance, such as we have in the civil courts.

Mr. Royall. There is some distinction there.

Mr. Kilday. But isn't it your belief that a thorough preliminary investigation is in the interest of prosecution, rather than in the interest of the defense? In other words, when the case is thoroughly investigated and all of the evidence is assembled, there is much more likelihood of a guilty man being convicted.

Mr. Royall. We believe very strongly in it and we will provide for it as strongly as we can, without making it grounds for a technical appeal. That is the only difference we have.

Mr. Kilday. In doing so you don't make it more strenuous on the man who might be accused, I mean in not making it a jurisdictional question. That would be, in my opinion, in favor of the accused, rather than in favor of the prosecution.

Mr. Royall. It would be in favor of the accused.

Mr. Kilday. I make that point—

Mr. Royall. We all know, in civil life, those of us who have tried criminal cases for the defendant, we look with technical zeal at the grand jury proceedings and try to see whether the jury was properly drawn, and all that. We

know when we do so, that we are just being technical. We know it hasn't anything much to do with the guilt or innocence of the accused. I think we want to avoid just such technicalities. We should insist to the limit on a preliminary investigation, short of making it a technicality.

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